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CONVEYANCER'S NOTEBOOK

The publishers' slip on the front of the last number was unfortunately worded and gave rise to some misunderstandings. In order to remove these, we are asked to make it clear that in 1950 this journal will continue to be issued quarterly. Each complete volume, however, will be completed in one calendar year and not, as in the past, be spread over two years, and the subscription will run accordingly.

There was an unfortunate mistake in making up the precedents in the last issue. In order to rectify this we are printing in this number new pages numbered 515 to 517 to replace those printed last time. A slip is inserted to remind the binder to destroy the original pages when binding up the volume.

CAVEAT EMPTOR

A correspondent writes :—

A preliminary objection may be lodged against the view advocated by Dr. Harold Potter with a wealth of learning in the September issue of this journal that a land owner has no longer a fee simple in his land but only a fee simple in the right to its use.

For this revolutionary theory alleged to result from the Town and Country Planning Act, 1947, Dr. Potter did not cite any express words from that Act—there are none.

Therefore his argument must be regarded as based on the doctrine of necessary implication.

It is respectfully submitted that that doctrine cannot be called in aid here.

On that point it is relevant to consider the objects of the Act.

These are briefly stated in the Explanatory Memorandum issued with the Act.

Amongst these are :—

(1) to introduce the new planning system;

(2) to confer on ministries, local authorities and statutory

undertakers wider powers of compulsory acquisition in order to make the land available for necessary development;

(3) to provide a new basis of compensation for compulsory acquisition in respect of the 1939 standard prescribed by the T. & C. P. Act, 1944;

(4) to provide for payments (aggregating three hundred million pounds) in respect of depreciation in value of freehold and leasehold interest) in land caused by the Act and the corresponding Scottish Act;

(5) to secure the collection of development charges where the grant of permission to develop land results in an increase in value;

(6) to provide Exchequer grants to assist local authorities in the acquisition and clearing of land.

Then follows a statement that the principal effect of the Act will be to remove the compensation-betterment defects which have obstructed planning in the past.

This might have been stated to be one of the objects of the Act if not its principal object.

There seems to be nothing in these objects on which to found the argument that it is a necessary implication from the terms of the Act that the old fee simple in land has been abolished and that in its place a new fee simple in the right to use land has been created.

If such a sweeping change in the Law of Real Property had been contemplated by the framers of the Act and in its passage through Parliament surely express words to give effect to it would have been inserted in the Act. There are no express words in the Act and the argument must therefore be based on necessary implication from it.

On the view here submitted the necessary implication cannot be drawn from the Act.

There is therefore no basis left for the contention, and the preliminary objection to Dr. Potter's case succeeds and it becomes unnecessary to consider the learned arguments adduced by him in support of it.

We are indebted to our learned correspondent for putting so clearly the doubt which assails many members of the profession. It also gives us the opportunity of explaining why respectfully we differ from him.

We may begin by remarking that if his assumption is correct it is difficult to see why the promoters of the Bill in the Lords and Commons, the Lord Chancellor and the Minister of Town and Country Planning (both lawyers), should have both described it as creating a revolution in "land tenure". The restrictions on use are far from revolutionary, since they are the natural development from restrictive covenant to building scheme, and from building scheme to local planning. Compulsory acquisition is equally ancient, again beginning with "private" powers, *e.g.*, under the Railway Clauses Act, to public powers under numerous Acts. Again, granting permissions for money value is not at all unknown and again no doubt began in connection with private transactions such as leases.

What is revolutionary in the Act is precisely the fact that all that a vendor has to sell is the existing use, and all that a purchaser acquires is the existing use. Any other "use" a landowner must *buy* from the

State, if it has any value, because a development "charge" means charge in the sense of fee or price and not charge in the sense that that term is normally employed in the land law. Furthermore, the price which the landowner must pay for this other use is in the discretion of the vendor, the Central Land Board. More than that the Central Land Board can sell the new use to a third party and then acquire the land for him. To our mind it ceases to be realistic to describe the owner of a fee in such circumstances as having those powers of use and enjoyment which before 1947 were customarily associated with the idea of fee simple.

Turning to the more specific point that an alteration fundamental to the law cannot reasonably be read into legislative enactments of this kind, we should say that it was consistent with the history of the land law to do so. In fact it would be out of keeping with its earlier history to do otherwise.

One very interesting illustration of the changes effected in the law by legislation which may not have been intended is to be found in the history of legal contingent remainders. At common law a limitation "to A for life and subject thereto to A's first son who shall attain twenty-five" was valid: cf. *Symes* v. *Symes*, [1896] 1 Ch. 272. In a will coming into force after 1897 it became void for perpetuity, because the legal estate first vested in the legal personal representatives by virtue of the Land Transfer Act, 1897: *Re Robson*, [1916] 1 Ch. 116; but it remained valid in a grant *inter vivos*. After 1925 it is generally assumed that in a deed or will it operates as a grant to A for life and subject thereto to A's first son who shall attain twenty-one, because all remainders must now be equitable, and this notwithstanding the provision in section 4 (1) of the Law of Property Act, 1925, that "save as otherwise *expressly* provided by statute, interests in land which under the Statute of Uses or otherwise could before the commencement of this Act have been created as legal interests shall be capable of being created as equitable interests". It is true that by reason of this last provision the general assumption may be unfounded, nevertheless we do suggest that this is a substantial change in the law which has happened simply as a side wind from changes made with another motive. We submit that the revolution in the nature of the fee simple which we suggest to have taken place is not more revolutionary than the destruction of the rules governing the validity of legal contingent remainders and based upon the doctrine of seisin. We believe that no mention either of the rules or of seisin is mentioned in connection with the second revolution we have noted.

Again, the 1925 Acts were conveyancing Acts and were not intended to alter the character of beneficial interests, yet nevertheless most concurrent interests have ceased to be realty and become personalty: *Re Kempthorne*, [1930] 1 Ch. 268. It is clear from the argument in this case that the framer of the statutory trusts for sale had not anticipated this result.

The Statute of Uses completely revolutionised interests in land by introducing springing and shifting uses. Any student of that Statute is aware of the fact that no such notion was present to the minds of its framers. Had they thought of it they would probably have taken steps to avoid such an event.

We hope that these illustrations may suffice to show that we must construe the effect of the new statutes not merely in the light of what is specifically provided but also of the revolutionary results that may flow from such provisions. We may have reason to regret that more attention has not been paid to the conveyancing aspect of this legislation and that attempt was not made to enable the fundamental effects to be dealt with more simply. This is no new thing either. It remains the official attitude (so we believe) of the Land Registry that the Land Registration Act and Rules make no difference in the substantive land law, but we would suggest that this attitude is difficult to reconcile with a close examination of the position respectively in the law of unregistered and registered land. Here, again, simplicity could have been achieved by more adequate attention to substantive rules of law, but seemingly that is not our way. Indeed, it may be argued that in general it has never been our way in English law; we have preferred to concentrate upon the necessary detail of machinery, leaving it to time to produce the fundamental principle; but that is no reason why we should not draw those conclusions in principle without waiting for litigants expensively to obtain the information.

Another correspondent writes :—

In your issue for September we note that you give a precedent for a recital concerning the user of property authorised on the appointed day under the Town and Country Planning Act, 1947, and you also give a precedent for a declaration of use at the date of a conveyance.

It occurs to us that the declaration would be unnecessary if the recital not only stated the user of the property on the appointed day but also the user of the property at the date of the conveyance as follows :—

> " the said property was on the 1st day of July, 1948, and is now used as a *etc. etc.* . . ."

We shall be very interested to have your opinion.

The recital is inserted as all recitals of title are inserted for that purpose. If it is a choice between recital and declaration of use, the recital should be omitted. It is convenient to state the use on July 1, 1948, in the same manner that it is convenient to state that at the date of his death the testator was seised, etc. The declaration of use forms an essential feature of the operative part. In our view, even if there is no express clause extending the covenants for title, a vendor would still be liable on his covenants for title if the declaration proves to be false and the purchaser can prove damage. We think that this might not apply in the case of a recital : cf. *Page* v. *M. R. Co.*, [1894] 1 Ch. 11; and consequently the declaration is the more important. Obviously where there has been a change of use, it is desirable to have recitals as well as the declaration which can deal only with the existing use at the date of conveyance, but even then should refer to the specific planning permission authorising the use.

" *Development* " *by local authorities.* Development by local Planning Authorities Regulations, 1948 (SI 2302/48) have been made under

section 35 of the Town and Country Planning Act, 1947, and the Ministry has issued circular 61 explaining the Regulations and reprinting the forms. We must say that this duplication seems to go rather far. As circular 61 will be sent to most practitioners concerned we think it necessary only to draw attention to its existence and to the Regulations it explains.

The Ministry of Education has also issued a circular with forms: circular 188, dealing with the compulsory acquisition of land for educational purposes. It points out that unless the land is required immediately it should not be purchased but can be *designated* for compulsory purchase later on. This machinery should be noted by all practitioners because it will be employed by other public authorities than education authorities. The circular also points out that the education authority can only acquire land for itself or educational institutions which it aids: Education Acts, 1944–48, but that it can acquire other land perhaps as a planning authority under the Town and Country Planning Act. This should also be noted as a procedure. The forms issued are there for application for approval of land and buildings acquired and replace the existing forms.

DEROGATION FROM THE GRANT

By J. F. Turing, Solicitor

"A maxim which really is as old, I will not say as the hills, but as old as the Year Books and a great deal older" was how Bowen, L.J., described the common law rule that a man must not derogate from his grant (*a*).

Scientific grouping of "derogation cases" is a matter of some difficulty, but in most of them some particular inference has proved to be the key to the problem or at all events the *sine qua non* of the decision. It is proposed, therefore, to adopt a rough and ready classification of the cases according to the inferences to be drawn from:—

(1) Topography,
(2) Parcels,
(3) Purpose of grant,
(4) Description of grantee,
and (5) The setting of the transaction.

(At the end will be found a short note on *profits à prendre* which do not fit very comfortably into this rather arbitrary arrangement.)

The method adopted is purely one of convenience and not of principle. Hence, if we may adopt the jargon of town planning, some "overspill" between groups cannot be avoided.

Topography

This term is here used in a very general sense to mean the lay-out of land, including buildings and their appurtenances.

(*a*) *Birmingham Dudley and District Banking Co.* v. *Ross* (1888), 38 Ch. D. 295, at p. 312.

Some of the basic inferences from topography are to be found very clearly explained in the judgment of Sir George Jessel, M.R., in *Allen* v. *Taylor*, 16 Ch. D. 355, in the following passage:—

"There can be no doubt that the law as laid down by *Palmer* v. *Fletcher* (*b*) is the law of the present day: that is that when a man grants a house in which there are windows, neither he nor any one claiming under him can stop up the windows or destroy the lights. That is based on the principle that a man shall not derogate from his own grant; and it makes no difference whether he grants the house simply as a house, or whether he grants the house with the windows or the lights thereto belonging. In both cases he grants with the apparent easements or quasi-easements. All that is now, I take it, settled law.

I take it also that it is settled law that, if a man who has a house and land grants the land first, reserving the house, the purchaser of the land can block up the windows of the house.

Then there comes a third case. Supposing the owner of the land and the house sells the house and the land at the same moment, and supposing he expressly sells the house with the lights, can it be said that the purchaser of the land is entitled to block up the lights—the vendor being the same in each case and both purchasers being aware of the simultaneous conveyances? I should have said, certainly not. In equity it is one transaction. The purchaser of the land knows that the vendor is at the same moment selling the house with the lights and as part of one transaction he takes the land: he cannot take away the lights from the house."

The three cases instanced by Sir George Jessel may be expressed in this tabloid form: (1) grant of a house with reservation of land; (2) grant of land with reservation of house; and (3) grant of house to A, and land to B, simultaneously.

An interesting little extension of the principles applied in the third case is to be found in *Pollard* v. *Gare*, [1901] 1 Ch. 834. A, being the owner of plots 1 and 2, agreed to let plot 1 to B on a building lease, B agreeing to build a house on it of a specified character. Subsequently A sold plot 2 to C. Then, B having built the house on plot 1, C erected a blank hoarding on plot 2 which obstructed the access of light to the kitchen window of B's house. In an action brought by B's executor against C, it was held that C had necessarily succeeded to the obligations as well as to the rights of the grantor, and the plaintiff was granted an injunction. The rule against derogation was thus applied, not to the vacant piece of land, but to the land with the house on it according to the contract, which was taken for that purpose to have been fulfilled.

The surrounding circumstances may be of such importance that more weight ought to be attached to them than to the normal inferences from topography. This aspect of the rule will be considered later in more detail under another heading, but mention may be made here of the case cited in the first paragraph—*Birmingham Dudley & District Banking Co.* v. *Ross* (1888), 38 Ch. D. 295. That was a case where the plaintiffs and the defendant both derived title, directly or indirectly, from the Birmingham Corporation, their respective properties being

(*b*) (1663), 1 Lev. 122; 1 Sid. 167, 227.

separated by a strip of land some 20 feet wide. The plaintiffs, whose building was some 48 feet high, complained that a new building, which the defendant proposed to erect to a height of 80 feet, would obstruct the access of light and air to their building and claimed an injunction on the ground (*inter alia*) that the erection of a building of that height would amount to a derogation from the grant of the common predecessor from whom the defendant derived title of subsequent date. But the circumstances were such that in the judgment of the Court the plaintiffs, or their predecessors in title, must or should have known that the Corporation would be selling off other land for development, and since they had taken no steps to protect themselves against that event they failed in their action.

The *Birmingham Banking Co. Case* incidentally established that the principles of " derogation " are not confined to adjoining parcels of land.

Inferences of the *Allen* v. *Taylor* and *Pollard* v. *Gare* type must not in any case be drawn except after a careful examination of the contractual relationship of the parties, for it has become common practice both between vendor and purchaser and landlord and tenant to exclude the disturbing operation of the rule.

It is not the purpose of this article to deal with methods of " contracting out ", but suitable forms will be found amongst the standard precedents. (See, for example, the common form condition on sale of property in lots, which excludes the implication of a grant " interfering with the free use of any adjoining or neighbouring lot for building, or other purposes " (*c*); the common form reservation of the right to alter or erect buildings although such works may destroy the access of light, etc., to the property agreed to be sold (*d*); and the reservation of similar rights in leases) (*e*).

For the application of the rule, the grantor must have some estate in the land—an obvious point which may easily be overlooked. To put the matter in another way, an easement cannot be granted by implication which the grantor could not grant expressly. Reference on this subject may be made to the curious case of *Quicke* v. *Chapman*, [1903] 1 Ch. 659, in which the defendant had no more than a licence from the Ecclesiastical Commissioners to build houses, and under his contract with them was not entitled to take up a lease of any given plot until a house had been built on it. The plaintiffs, who were assignees from the defendant of a 99 years' lease of a plot and completed house, sought an injunction against the defendant to prevent his building a house on an adjoining plot in which, at that time, *ex hypothesi*, he had no estate. Cozens-Hardy, L.J., said that he declined " to imply a grant of light as against a man who could not have made an express grant of light over the land " (*f*), and the action was dismissed.

An interesting " topographical " case involving an unlawful interference by landlords with the property of their tenants was *Frederick*

(*c*) Key and Elphinstone's *Conveyancing Precedents*, 14th ed., Vol. 1, p. 426 (and see footnotes).
(*d*) *Ibid.*, pp. 426–427.
(*e*) *Ibid.*, p. 915.
(*f*) *Quicke* v. *Chapman*, [1903] 1 Ch., at p. 671.

Betts, Ltd. v. *Pickfords, Ltd.*, [1906] 2 Ch. 87. The defendants were the plaintiffs' landlords and owned adjacent property. In reliance upon an agreement with the plaintiffs' architect (which, in the event, was held to be outside the scope of the architect's authority) they built certain roof beams and stanchions, the property of the plaintiffs, into the back wall of a warehouse, thus converting it into a party wall under the London Building Act, 1894, and so visiting upon the plaintiffs a direction from the local authority to block up their windows. It was held that the plaintiffs were entitled by implied grant, during the continuance of their lease, to an unqualified right to access of light coming through the windows in question and that the use by the defendants of the wall as a party wall constituted a derogation from the grant and a trespass. The defendants were accordingly ordered to disconnect their buildings from the wall.

Parcels

A case illustrating how inferences from the parcels may result in an implied grant, and one from which the grantor cannot afterwards derogate, was *Mellor* v. *Walmesley*, [1905] 2 Ch. 164. In a conveyance certain land was described as " situate on the seashore ". The exact dimensions of each side of the plot were then given, as well as the area, and it was stated that the plot was bounded (*inter alia*) " on the west by the seashore ". This case is sometimes cited as an authority for the meaning of the word " seashore " (which in its context was held to be equivalent to " foreshore " *i.e.*, the land situate between medium high and low water marks) but its interest for the present purpose lies in the observations of Vaughan Williams, L.J., at p. 175 in the following passage :—

" I think that the predecessor in title of the defendants, having stated in the conveyance that the land conveyed is situate on the seashore and is bounded towards the west by the seashore, is estopped from saying that the whole of the land intervening between the western boundary as described by the dimensions and plan is anything else than seashore. I think that to allow the defendants so to say would be *to allow them to derogate from the grant of their predecessor in title.*"

His Lordship then went on to say that " the predecessor in title of the defendants impliedly covenanted that he would do nothing to prevent the grantees enjoying the piece of land and the house . . . as a house facing the sea and having the seashore as a boundary ".

For a rather similar case involving land abutting on a roadway, reference may be made to *Roberts* v. *Karr*, 1 Taunt. 495.

For a converse case, where the grantee successfully based his claim upon the surrounding circumstances, see *Rudd* v. *Bowles*, [1912] 2 Ch. 60 (*infra*).

Purpose of Grant

The grantor of land to be used for a particular purpose is broadly under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made, being a purpose known to the grantor at the time of the grant.

The scope of this proposition is not confined to easements. "Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implication of any easement known to the law" (*g*). Thus in *Aldin* v. *Latimer Clark, Muirhead & Co.* (*h*), the grantor was restrained from interfering with access of air to a timber merchant's sheds for drying timber, and this though "the law does not recognise any easement of air unless it comes through or to some defined passage or aperture" (*i*). And in *Grosvenor Hotel* v. *Hamilton* (*k*) it was held that there was an implied obligation on the part of a lessor not to derogate from his grant by using his adjoining property so as to interfere with the stability of certain premises that he had let.

In the *Grosvenor Hotel Case* the premises were in a shaky condition at the time of the lease, and it was argued for the defendants "that the plaintiff was seeking to impose on his landlord a duty more extensive than that of an ordinary neighbour, for that to make vibration caused by a neighbour actionable it must be such as would damage a house of reasonable strength" (*l*). Lindley, L.J., commented that "if the case were not between lessor and lessee that might be so, but we are dealing with landlord and tenant, a fact which gives the case a different aspect . . . . If we were to decide according to the plaintiff's contention, we should be allowing the defendant to derogate from his own grant".

The principle must not be carried too far. A landlord who lets part of his property for the purpose of a particular trade is not to be taken as having entered into an implied contract precluding him from a reasonable and ordinary use of the remainder on the ground that such uses injures *a particular class* of his tenant's goods, at all events if it was not known to him at the time of the letting and it is not a matter of common knowledge that the particular class of goods used in the tenant's trade are liable to be so injured (*m*).

In *Robinson* v. *Kilvert* the landlord knew that the tenant would be using the demised premises for storage of paper but was ignorant at the time of the letting that the defendant intended to store a particular kind of paper susceptible to damage by heat. Lindley, L.J., said that the evidence fell short of proving that the plaintiff's room was unfit for storing paper; it showed only that it was unfit for storing a particular kind of paper, and added that "if a tenant wants extraordinary protection for a particular branch of trade he must bargain for it in his lease" (*n*).

Similarly in *Port* v. *Griffith*, [1938] 1 All E. R. 295, it was held that in the absence of express stipulation a landlord is not precluded from letting adjoining premises to a trade rival of his tenant. The defendants let a shop for a term of 21 years to the plaintiff who covenanted "to use and occupy the premises . . . as a shop for the retail business of the sale of wool and general trimmings and for no

(*g*) *Per* Parker, J., in *Browne* v. *Flower*, [1911] 1 Ch. 219, at pp. 225–226.
(*h*) [1894] 2 Ch. 437.
(*i*) *Per* Parker, J., *supra*.
(*k*) [1894] 2 Q. B. 836.
(*l*) *Per* Lindley, L.J., at p. 840.
(*m*) *Robinson* v. *Kilvert* (1889), 41 Ch. D. 88.
(*n*) *Ibid.*, at p. 97.

other purpose without the consent in writing " of the defendants. Some six years later the defendants let the adjoining shop subject to a similar covenant, the business being for the sale of tailor and dressmaking trimmings and cloths. The plaintiff contended that this was a derogation from the grant of the lessor, as frustrating the purpose for which, in the contemplation of both parties, the premises were let to the plaintiff. It was held that it was not within the reasonable contemplation of the parties that the defendants were putting themselves under an obligation not to let their adjoining property to the plaintiff's trade rival.

It is sometimes asserted that mere interference with privacy or comfort of residential property does not amount to a derogation from the grant, but an examination of the leading case usually cited in support of that proposition will show that it is much too widely stated. The case in question—*Browne* v. *Flower* (*o*)—was one in which the plaintiffs complained of interference with their privacy and comfort arising out of the erection of a staircase leading from the garden to an upper part of the adjoining maisonette. This presented them with a choice between drawing their curtains or suffering their neighbours to view their domestic activities from the new staircase. In his judgment dismissing the plaintiffs' action, Parker, J., said (*p*) :—

" Under the circumstances, the question is whether the existence of this staircase renders the plaintiffs' premises unfit or materially less fit (*q*) to be used for the purposes for which they were demised, that is for the purposes of a residential flat. In my opinion it does not. The two rooms in question can be, and are still in fact used for the same purpose for which they were used prior to the erection of the staircase. It is only the comfort of the persons so using the rooms that is interfered with by what has been done. Either they have less privacy or if they secure their privacy by curtains, they have less light. Much as I sympathise with the plaintiffs, it would in my opinion, be extending the implications based on the maxim that no one can derogate from his grant to an unreasonable extent if it were held that what has been done in this case was a breach of an implied obligation ".

Browne v. *Flower* should be compared with *Newman* v. *Real Estates Debenture Corporation, Ltd. and Flower Decorations, Ltd.*, [1940] 1 All E. R. 131, where the landlords let out the whole of a building (except the ground floor) as residential flats, the plaintiff being the tenant of one of these flats. Subsequently the landlords let the building to a company subject to and with the benefit of the residential tenancies, including that of the plaintiff. The company carried on their business in such a way as to cause the plaintiff disturbance and annoyance. The defendant landlords on that account were held to have derogated from their grant. Unfortunately this case was decided against the defendants also (and principally) on other grounds, *viz.*, the existence of a " building scheme " which imposed special obligations upon them, but nevertheless it stands as an authority on derogation and serves to mark the limitations of *Browne* v. *Flower*.

(*o*) [1911] 1 Ch. 219.
(*p*) At p. 227.
(*q*) As to what degree of interference would render the premises materially less fit, see *Newman* v. *Real Estates Debenture Corporation, Ltd. and Flower Decorations, Ltd.*, [1940] 1 All E. R. 131.

Description of Grantee

Cases under this heading are analogous to those just discussed under the heading " Purpose of Grant ", where the grantor has been restrained from putting his adjoining property to a use inconsistent with the purpose of the grant. There is only this distinction, that an inference is first drawn from the description of the grantee that the premises were demised for a certain purpose, and then the same further inferences follow as though that purpose had been expressly stated in the instrument.

In *Herz* v. *Union Bank* (1854), 2 Giff. 686, the plaintiff was a diamond merchant and was so described in the lease of a dwelling-house in which he carried on his business. The defendants were the owners of adjacent premises, and at some stage in the proceedings they rather ill-advisedly purchased the reversion to the plaintiff's house. The plaintiff sought and obtained an injunction restraining them from constructing a party wall so as to occasion such an obstruction to the plaintiff's ancient lights, *however slight*, as would injure him in his business.

Referring to the argument advanced by the defendants that the plaintiff was not entitled to more light than would be required for the enjoyment of a dwelling-house as such, the Vice-Chancellor said :—

" The present case is of a different kind (*r*) : the defendants are the owners of the reversion and the plaintiff is described in the lease as a diamond merchant. There seems to be no sound principle on which, where the demise of a house is to a person known to sustain such a character as that any diminution of light would disturb his enjoyment in that character, the reversioner can be allowed to withdraw or obstruct anything necessary to his enjoyment of the demised property in that character ".

A similar case was *Hall* v. *Lund* (1863), 1 H. & C. 676, in which the defendant was described in a lease as a bleacher. The plaintiff, who had bought the reversion to the defendant's mill, brought an action with the object of preventing the defendant from polluting a stream with waste products from his bleaching works. It was held that there was an implied grant to the defendant of the right to use the stream for the purpose of his business as a bleacher, and the plaintiff having, as it were, succeeded to the grantor's duty not to derogate from that grant, failed in his action.

The Setting of the Transaction

It may be found convenient if we consider under this heading a few cases in which the special circumstances of the transaction have turned the scale. It must not, of course, be inferred from this method of treatment that there is any distinction of principle between the cases so grouped and those considered under other headings : the principles remain the same and there is constantly the need to keep the setting or framework of the transaction in mind.

In *Rudd* v. *Bowles*, [1912] 2 Ch. 60, the defendant B granted certain leases for ninety-nine years to one G of adjoining plots for

(*r*) Cf. remarks of Lindley, L.J., in *Robinson* v. *Kilvert*, *supra*.

building purposes. These plots faced H road on the south and were bounded on the north—that is at the back—by a strip of land coloured brown on the plans drawn on the leases; the westerly plot adjoined E road on the western side. The brown strip was included in a preliminary building agreement but not in the premises demised by the leases. The plaintiff, as mortgagee of the leasehold interests in possession, claimed a right of way over the brown strip from E road to the rear of the premises. The defendant, objecting that the brown strip was his property (having been excluded from the premises demised), claimed the right to build upon it in such a way as to block this means of access.

In this case the leases, by the mutual agreement of lessor and lessees, bore dates some fourteen months later than the dates on which they were executed. The material textual change involved (*viz.*, of the calendar year), was held to be binding upon the parties. This ruling, in the event, proved fatal to the defendant's case, for by the later date the houses had been erected with fences at the back so constructed as to give access to the brown strip and without any other means of carrying coal, manure or garden refuse than through the houses themselves (*s*).

The Court held that the circumstances existing at the dates borne by the leases (as distinct from the dates of execution) could be looked at in construing the leases and the plans, and that having regard to the way in which the land was laid out at that time (*t*), the lessees and the persons deriving title under them were entitled to an implied right of way.

Readers who have mustered the patience to unscramble this omelette may care to refer also to the rather similar case of *Hansford* v. *Jago*, [1921] 1 Ch. 322.

For a case in which, by contrast, the circumstances surrounding the transaction were successfully invoked by the successors in title of the *grantor*, see *Birmingham, etc., Banking Co.* v. *Ross*, discussed, *supra*, under the heading " topography ".

An instructive case containing a review of some earlier authorities was *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.*, [1921] 1 Ch. 200. In December, 1911, A, the tenant for life of a settled freehold estate in Cornwall, granted to the plaintiff a lease of a small piece of land for twenty-one years for the purpose of an explosives magazine, the land being situate in an area of disused tin mines which had not been worked for very many years. About the same time the plaintiff applied for a licence for his magazine under the Explosives Act, 1875; this involved a hearing before the local justices in October, 1911, and preliminary notices of the hearing in the local newspapers. Apparently official machinery did not move much faster in those days than it does now, for it was not until 1913 that the plaintiff received the formal licence, but the terms of it had already been settled in 1911 about the time that the lease was granted.

The price of tin having greatly increased as a result of the first

(*s*) *Per* Neville, J., at p. 66.

(*t*) See observations of Neville, J., at p. 66, to the effect that the action proposed by the defendant (*viz.*, of building a house) would " stultify the intention to be inferred from the method in which he laid out the land ".

World War, the working of the disused mines again became a commercial proposition. In 1919 the defendants obtained from B (A's successor in title) a lease of land adjoining the plaintiff's land for the purpose of working minerals. B (who seems to have been well advised in this transaction) stipulated in the lease that the minerals should not be worked in such a manner as to interfere with the plaintiff's magazine. After entering into occupation under this lease from B, the plaintiff (*inter alia*) erected three buildings or sheds within such close distances of the plaintiff's magazine as were prohibited by the conditions of the plaintiff's licence. This action put the licence in jeopardy and threatened to put the plaintiff's magazine out of business.

The Court of Appeal (reversing the decision of Eve, J.) held that under the circumstances in which the 1911 lease was granted (and imputing to the grantor knowledge of the terms of the embryo licence) there must be implied on the part of the grantor an obligation not to do anything which would violate the conditions under which the plaintiff held the licence; that the acts done by the defendants would, if done by the grantor, have been in derogation of his grant; and that inasmuch as the defendants for this purpose were in the same position as the grantor, the acts must be regarded as done by him. The plaintiff's appeal was accordingly allowed.

This decision makes it clear that it is not always necessary to prove physical interference with the land granted: it is a derogation if the grantor, or some person deriving title under him, puts the neighbouring land to such a use that the purpose for which the grant was made (known to both parties at the time) becomes illegal (*u*).

Profits à Prendre

The principles discussed apply also to a grant of *profits à prendre*, *e.g.*, shooting rights.

In *Peech* v. *Best*, [1931] 1 K. B. 1, a farmer sold part of certain land, over which sporting rights had been granted, for the purpose of the erection of a training stable for thirty-six horses, with cottages for attendant stable-boys and caretakers. This was held to be a derogation from the grant. In the Court of Appeal, the late Lord Justice Scrutton said: "I should doubt myself, when the stables for thirty-six horses and the six stable-boys are in occupation whether a game-bird would be left within a quarter of a mile of the stables" (*a*).

In *Werner* v. *Morris*, 79 L. J. 272, the plaintiff had sporting rights on about 5,000 acres of grouse moor, the defendant being the owner of about 100 acres of this land. Subsequently to the grant of the shooting rights, the defendant gave a licence to a gliding association to use his land for the purpose of making gliding flights. It was contended on behalf of the plaintiff that these meetings drove away the grouse and he obtained an injunction to restrain the holding of meetings.

(*u*) "I cannot see why the acts of the defendants should not have the same effect whether the change brought about by them is a physical change in the condition of the demised premises or a change in their condition brought about by the fact that it has become illegal to use them for the purpose intended by the demise". *Per* Warrington, L.J., at p. 224.

(*a*) At p. 15. The salient facts are taken from the same judgment.

Fishing rights, being *profits à prendre* (*b*), would qualify for similar protection (*c*).

Relationship of the Rule to Implied and Statutory Grants

(a) *Implied Grants at Common Law.*

"Even at common law all rights legally appendant or appurtenant to the property would pass without mention" (*d*). Cases falling within this rule have little or nothing to do with the principle of non-derogation in its modern form, and are perhaps best regarded as common law interpretations of express grants. With the passing of section 6, Conveyancing Act, 1881 (now section 62, L. P. A. 1925) (*e*) this aspect of the subject has become largely academic (*f*).

A more difficult type of case is that bearing the stamp of *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31, usually cited (*g*) as authority for two propositions:—

(a) that by the grant of part of a tenement, all those continuous and apparent easements over the part retained by the grantor, which are necessary to the enjoyment of the part granted, and have before and up to the time of the grant been used therewith, pass to the grantee; and

(b) that in the absence of express stipulation there is, as a general rule, no corresponding implication in favour of the *grantor* (ways of necessity and certain other indispensable and traditional rights excepted) (*h*).

Familiarity with what might be described as the "positive" and "negative" aspects of the rule will serve to show that cases of the *Wheeldon* v. *Burrows* type—many of them decided long before that celebrated case—have much more in common with the rule than is sometimes supposed. Let us take Sir George Jessel's first proposition in *Allen* v. *Taylor* (*i*):—

> "When a man grants a house in which there are windows, neither he nor anyone claiming under him can stop up the windows or destroy the lights. That is based on the principle that a man shall not derogate from his own grant. . ."

Here is a clear "negative" expression of the rights of the parties

(*b*) *Wickham* v. *Hawker* (1840), 7 M. & W. 63.

(*c*) Cf. *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96, where the plaintiff succeeded in an action in trespass against a stranger to the deed of grant. The defendant was a railway contractor who discharged muddy water into the River Chess, whence it passed to the River Colne. According to the plaintiff's case "the effect of this was to make the stream too opaque for the fish to see the bait, to drive away the fish and to damage the spawning beds".

(*d*) See Prideaux's *Precedents in Conveyancing*, 24th ed., Vol. 1, at p. 212; and see Norton on *Deeds*, 2nd ed., p. 274, citing Co. Litt. 121b., Shep. Touch 89; *Whistler's Case* (1612), 10 Co. Rep. 63a.

(*e*) See under that title, below.

(*f*) See for example *White* v. *Williams*, [1922] 1 K. B. 727, noted *infra*, which seems to have been decided wholly on the statute, though treated by *Norton* as falling within the common law principle (*op. cit.*).

(*g*) The first point had been decided more than two centuries earlier in *Palmer* v. *Fletcher*, 1 Lev. 122, and was not directly in issue in *Wheeldon* v. *Burrows*; the second point had been mooted in many cases and finally settled in *White* v. *Bass*, 7 H. & N. 722.

(*h*) For a convenient catalogue of these exceptions, see judgment of Greer, L.J., in *Aldridge* v. *Wright*, [1929] 2 K. B. 117.

(*i*) See under "topography", above.

inter se; for the same principle expressed in "positive" form (implied grant of a quasi-easement) one has only to refer to the first proposition in *Wheeldon* v. *Burrows*. That we are looking at the same coin—bearing admittedly different inscriptions on the two sides—is clear from the observations of Thesiger, L.J. (*Wheeldon* v. *Burrows*, at p. 49), where his Lordship described both the principles of "implied grant" and "implied reservation" as "founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, *viz.*, that a grantor shall not derogate from his own grant".

(b) *Section 62, Law of Property Act, 1925.*

The next problem for consideration is the relationship of the principle of non-derogation to express grants "imported" by statute. The word "imported" is used here advisedly to distinguish such express statutory grants from those implied at common law. Imported grants are read into a conveyance (*k*), if and so far as a contrary intention does not appear from the conveyance itself (*l*), in the form of the "general words" set out in section 62 of the Law of Property Act, 1925. With minor changes not material to be noted here, this section reproduces section 6 of the Conveyancing Act, 1881, and applies to conveyances made after December 31, 1881. For the history of the section we must therefore look back to conveyancing practice as it was before 1882, bearing in mind that, though *Wheeldon* v. *Burrows* gave expression to principles already and for many years latent in the common law, that case was not actually decided until 1879.

Now the object of section 6 of the 1881 Act was rather to shorten and simplify documents and to lighten the labours of the draftsman than to bring about radical changes in the law. This is not to say that it created no changes, since, by a paradox, law is seldom codified without being changed; making due allowance for fortuitous changes, the effect was rather one of stabilisation than reform.

It was not only law that was thus codified. The formula of "general words" commonly inserted in deeds by the old school of draftsmen was a remarkable amalgam of common law and uncommon precaution—in part an expression of what would be implied at law (*m*) and in part (depending upon the circumstances of each individual transaction) an amplification of it. The 1881 Act, by giving statutory recognition to this formula, at one stroke "codified" law and practice, so widening the first as to cover the second (*n*).

By this long process of evolution a substantial part of the law relating to derogation first became woven into implied grants, secondly into the text of conveyances by usage before 1882, and finally into the pattern of imported grants under the statute.

(*k*) Which term for this purpose includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of any interest therein by any instrument except a will. S. 205 (1) (ii) Law of Property Act, 1925.

(*l*) S. 62 (4) Law of Property Act, 1925.

(*m*) See the long list of cases (some mentioned *ante*) cited in the footnote to s. 62 in Cherry and Wolstenholme's *Conveyancing Statutes.*

(*n*) For a case on the "general words" illustrating this point, see *White* v. *Williams*, [1922] 1 K. B. 727. (Sheepwalk appurtenant to farm in N. Wales and admitted to be a *profit à prendre in alieno solo* passing on a conveyance of the farm under s. 62.)

The principles of non-derogation, despite all changes, continue in their primary function as "sauce" to the grant, and what is sauce for the express or implied grant is theoretically sauce for the imported grant. But inasmuch as the statute absorbed part of the common law, cases will frequently arise where the "general words" serve almost the same function as the old principles themselves. Cases involving easements and quasi-easements usually fall into this category and it may not be necessary to look beyond the statute, though it will, as a rule, be prudent to do so.

In sharp contrast to these cases falling within the statute, are those in which the grantee can derive no help from the "general words", but must rest upon the common law. In this category fall most of the authorities grouped above under the heading "Purpose of Grant". *Harmer* v. *Jumbil, etc., Ltd.*, under "Setting of the Transaction", is another example.

To the same category belongs the singular and enlightening case of *Borman* v. *Griffith*, [1930] 1 Ch. 493, which serves to illustrate the evolutionary process already discussed. This was a case raising certain questions upon an agreement for lease under hand. Not being an "assurance" of property nor of any interest therein within the terms of section 205 (1) (ii) of the Law of Property Act, 1925, the agreement did not import the "general words" of section 62. The plaintiff nevertheless claimed a right of way not mentioned in the agreement. Maugham, J., as he then was, applying the common law principles of implied grant, held that the plaintiff was entitled to such a right of way. Apart from the pains of litigation and an undertaking imposed upon him by the Court to shut the park gates (when he found them shut) the plaintiff emerged from this dispute in precisely the same position as though he had taken a grant *with* general words.

On neutral ground may be discerned a number of cases falling within the statute for some purposes and not for others. The dispensations of providence, aided by the predilections of Judges and textbook writers (*o*), have afforded them asylum in one camp or the other and sometimes in both. They defy any recognised system of classification, and may be regarded, according to taste, as authorities upon derogation, or upon implied or imported grants. For the reasons already explained these subjects are closely interdependent and are perhaps best looked upon as one composite whole.

SOME PRIORITIES IN REGISTERED ESTATES

By W. J. L. Ambrose, of the Middle Temple, Barrister-at-Law; Late Registrar at the Land Registry

If a proprietor of registered land, through fraud or mistake, sells the same land to two different purchasers, the question will arise: Which is entitled to be registered as proprietor? Such an occurrence

(*o*) See *e.g.* Gale on *Easements*, 11th ed., p. 114, where the selected method of grouping such cases is explained as a matter of convenience on the ground that "they have been treated by the Courts as depending on the Conveyancing Act, 1881".

is improbable if the sale is of all the land in the title, since the first purchaser will take over the land or charge certificate, and when the second purchaser finds he cannot get either he naturally refuses to complete. But, if the land sold is part only of the land in the vendor's title, neither purchaser will expect to receive the land or charge certificate, and the trouble may not arise till both have completed their purchases.

In all claims to registered land the question of possession is important, not only because section 82 of the Land Registration Act, 1925, makes it more difficult to obtain rectification of the register against a proprietor who is in possession, but also because section 70 makes all land, unless the contrary is expressed on the register, subject to " the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed ". And, if the rights of the person in actual occupation happen to be ownership in fee simple in possession, the registered title becomes valueless and must obviously be wrong; and if and when it is cancelled, the proprietor thereof can get no compensation or indemnity under section 83 : see *Re Chowood, Limited*, [1933] 1 Ch. 574.

Chowood, Limited, in that case, was the first registered proprietor of the land, but section 70 (which preserves the rights of every person in actual occupation) applies equally to second and subsequent proprietors of land and charges.

Let us assume that a vendor sells the same plot first to A and a few days later to B. A may think early possession is the most important thing, either because he is hard up for a home or because he fears predatory authorities, and in the bustle of moving in he omits to present his transfer to the Land Registry for registration, thinking perhaps that if he is in possession section 70 will see him home. The second purchaser, B, however, makes no inquiry on the ground, but registers his transfer a day or two before A's transfer is lodged for registration. Which has the better title and which should finally be registered as purchaser?

A will say :—

(1) My transfer was first executed and left nothing in the vendor to transfer to B.

(2) Rule 83 requires instruments or applications to be entered in a book in the order in which they are delivered, and rule 83 (2) is as follows :

> " The registration shall then be completed as of the day on which, and (in the absence of direction or inference to the contrary in or from the instruments or applications themselves) of the priority in which the instruments or applications were delivered ".
>
> The earlier date of my transfer supplies an irresistible direction or inference to the contrary to which the Registry should give effect.

(3) I am in actual occupation, and B made no inquiry as to my rights, so I could not disclose them.

B. will say :—

(1) (Relying on section 19) when my transfer was executed the

Registrar had not entered you, A, on the register as a proprietor of the land transferred to you, and until such entry was made the transferor was deemed to remain proprietor, and as such was perfectly competent to transfer the land to me.

(2) My transfer was duly delivered at the Registry days before yours, and rule 83 requires its registration to be completed with priority over yours.

Rule 83 (2) does not in terms say that a direction or inference to the contrary will override priority of delivery. It may imply that, but in any case there is no such implication if the instruments were delivered on different days, as these were. The position is then governed by the first part of rule 83 (2) and there is no need to resort to the latter part.

(3) Your rights as the person in actual occupation are merely the right to be registered as proprietor if and when your transfer is delivered for registration before mine. Now that can never be, so your rights are those of a mere trespasser. It was your delay in registering your transfer that led me up the garden.

Re Chowood, Limited (*supra*), is no help to you. In that case Mrs. Lyall (Chowood's opponent) had omitted no proper precaution, and done nothing to mislead Chowood, Limited.

It would seem that B has the best of the argument, but his troubles are not at an end. Registration as proprietor does not put him into possession. And if A is obstinate B may have to sue for ejectment. In that action the priority of A's transfer would have to be weighed against the technically correct title of B. No doubt B should prevail, but the Court would feel considerable sympathy with A.

If, however, A's claim prevailed, an order for rectification of the register against B would be called for. Registration of a transferee takes effect from the date of the delivery of his application to be registered (rule 83 of L. R. R., 1925), and as B's transfer was delivered first he was theoretically on the register when A's transfer was delivered and must be taken off the register before A could be registered as proprietor.

The learned author of the 14th edition of *Key and Elphinstone*, Vol. 3 (see page 52), points out that if purchasers refrain from registering their transfers in reliance on their rights as persons in actual occupation, the system of registration would largely fall to pieces.

So far no such general practice has grown up, and there is really no reason why it should. Registration fees are trifling, and in any case payment of them would only be postponed and not avoided, and while no doubt the transferee could, in theory, deal with the land under section 37 of the Act, he could not authorise inspection of the register till his transfer had been registered.

Meanwhile, he runs the risk of a caution or some other entry getting on to the register which would seriously embarrass him if and when he wants to deal with the land under section 37.

If the order of events is :—

(1) Registered proprietor executes a charge;

(2) Registered proprietor executes a transfer;

(3) Transferee goes into possession;
(4) Charge is presented for registration;
(5) Transfer is presented for registration;

the position of the transferee will be still weaker because section 27 (3) makes a charge " take effect from the date of the delivery of the deed, but subject to the estate or interest of any person (other than the proprietor of the land) whose estate or interest (whenever created) is registered or noted on the register before the date of registration of the charge ", and there is nothing in section 19 or elsewhere which enables the registered proprietor to transfer the land free from the charge before the charge is registered.

If the competition is between two charges it is improbable that either will go into possession before both charges are presented for registration. In any case section 29 says " subject to any entry to the contrary on the register, registered charges shall . . . rank according to the order in which they are entered on the register, and not according to the order in which they were created ".

As a result of rule 85 two applications might easily be delivered at the same time. Rule 85 (1) says that instruments and applications delivered by post or under cover during the hours in which the office is open shall be treated as delivered at the same time and immediately before the closing of the office, and instruments and applications delivered between the hours of closing and the next opening shall be treated as delivered at the same time and immediately after such opening.

These two groups include quite a lot of applications. Most of them have nothing to do with each other, and no question of priority arises, but it is possible that two conflicting applications, such as the transfers to A and B previously mentioned, might, under these rules, be delivered " at the same time ". Rule 83 quoted above offers the only solution of the problem, but deals with it in a rather negative manner.

Sub-rule (2) of rule 83 is often applied where an obviously second charge is presented for registration before the first charge, or a charge by a transferee is presented for registration before the transfer, but it must also apply when two applications conflict. It will be observed that the sub-rule suggests but does not in terms say that if there is a direction or inference to the contrary the priority of delivery can be ignored, and if that can be done when there is priority of delivery it should be permissible to infer priority from the terms of the instruments when neither has priority of delivery over the other because both were delivered at the same time. If so, the instrument with the earlier date might be given priority over the other.

It has been assumed so far that nobody has registered a priority notice under rule 88, or obtained an official certificate of search under the Land Registration Rules, 1930, as amended by the Rules of 1936. Priority notices have never been fashionable, but the official certificate of search is extensively used. Either of these might alter the whole position, since it would ensure priority for the periods prescribed by those rules, and might also have disclosed the vendor's fraud and entirely spoiled his little game.

Official certificates of search against part of the land in a title require the land in question to be defined by a plan which should be

clear and unambiguous. If a later searcher thinks his land or part thereof is included in an earlier official certificate of search he should, of course, refuse to complete till the matter has been cleared up.

There are a good many references to fraud in the Land Registration Code—no doubt because the prevention of fraud is one of its objects. But proprietors of registered land are no more fraudulent than others, and actual claims as a result of fraud are rare.

Other disputes arise, but these are usually the result of the creation of interests in the registered land of which the proprietor is unaware, or which he has forgotten. They generally appear on the register in the form of a caution which, of course, has a very limited effect and decides nothing. It is when an application to warn off the caution is made that the validity of such claims has to be established, and wider questions than mere priority under the Land Registration Act and Rules generally arise.

THE POSITION OF THE LEASEHOLDER IN THE LAW OF EASEMENTS

By A. K. Kiralfy, LL.M., Barrister-at-Law

One of the earliest rules of English law on the subject of easements was the statement of Bracton (220b), that a man cannot have a servitude over his own property. This generalisation from Roman law with its peculiar concept of Dominium was hardly appropriate to feudal England with its elaborate system of limited estates and it has exercised an unfortunate influence ever since. The remedy provided by the common law for the obstruction of an easement (such as a right of way) was the Assize of Nuisance (Holdsworth, *H. E. L.*, Vol. 3, p. 11; Vol. 7, p. 324). The Assize lay for and against freeholders only, partaking of the nature of a real action. The leasehold interest was not yet recognised as conferring anything more than a personal right of action. Where an easement was obstructed by someone other than the freeholder of what we now term the " servient tenement " no Assize lay, but later an action on the case was permitted (*Holbach* v. *Warner* (1624), Cro. Jac. 665). The corresponding step of allowing someone entitled for the time being to the dominant tenement to sue for obstruction was not taken. If the freeholder of the dominant tenement had acquired an easement against the freeholder of the servient tenement the occupier of the former might proceed by relying on his freeholder's rights (*Gateward's Case* (1607), 6 Co. Rep. 59b). But if both holdings were in common ownership this was impossible, and if the two holdings came into common ownership all easements were destroyed and only a few of them would revive on a new severance of the freeholds (Hobart 131, *Peers* v. *Lucy* (1695), 4 Mod. 362; *Baker* v. *Brereman* (1636), Cro. Car. 419).

At the present day, when the leasehold interest is for most purposes as secure as the freehold, the law of easements has been logically applied to both types of interest, and such differences as remain are

explicable less in terms of Bractonian principle than in those of common-sense and utility. The proposition that an easement is something peculiar to ownership in fee simple, or freehold generally, can no longer be maintained, although there is little reference in the reported cases to the gradual revolution of the law on this subject. Today the following general propositions of law may be stated, each of them to be then discussed in short.

(1) A lessor may expressly grant an easement to the lessee in the lease.

(2) A lessee from one freeholder may grant an easement to a lessee of another freeholder or to that other freeholder.

(3) A lessee from a freeholder may grant an easement to another lessee of the same freeholder.

(4) A lessor may by implication grant an easement to the lessee in the same way as on a sale of freeholds.

(5) A lessee from a freeholder may by implication grant an easement to another lessee of the same freeholder.

(6) An assignor of a lease may reserve an easement on an assignment, expressly or by implication.

(7) A lessor may reserve an easement to meet a prior grant to a lessee.

(8) A lessee under one freeholder may prescribe against a lessee from another freeholder under the doctrine of a lost grant, but not against another lessee from the same freeholder.

(9) Easements of light under the Prescription Act, 1832, can be claimed by lessees.

(1) Express Grant to the Lessee by the Lessor

In *Booth* v. *Alcock* (1873), 8 Ch. App. 663, Alcock held a lease of Blackacre for eighty years and an underlease of Whiteacre for four years. He subleased Blackacre and expressly granted the sublessee rights of light over Whiteacre. It was held that this grant was valid, but for four years only. When Alcock bought the freehold of Whiteacre it was held he was not liable after the four years expired. Another case in point was *Key* v. *Neath R. D. C.* (1905), 93 L. T. 507 (affirmed without stating reasons, 95 L. T. 771, C. A.). Plaintiff had taken a lease from two persons, S and B, who were yearly tenants of land. Express easements of water were granted in the demise. Lord Alverstone, C.J., at p. 510, says, " Does the fact that S and B were not the owners in fee of the reservoir make any difference? I hold the pipe . . . was an easement or watercourse which passed under those words of grant, and that, that being so, the mere fact that his title to get the water was defective would not justify the lessor in cutting it off ". Ridley, J., at p. 511, agreed, " Here there is a grant or lease . . . not indeed for perpetuity but a lease for a term of years with regard to the house and a lease of certain rights which will endure with the house as long as the person who made the grant continues, or his successors continue, to be tenants from year to year of the reservoir ". This principle was admitted in *Kilgour* v. *Gaddes*, [1904] 1 K. B. 466 and

Wheaton v. *Maple*, [1893] 3 Ch. 65, and assumed in *Clapman* v. *Edwards*, [1938] 2 All E. R. 507, where a right granted by an underlease would have been an easement had it been limited to the needs of the property underlet.

(2) Express Grant by One Lessee to Another

In *Wheaton* v. *Maple*, [1893] 3 Ch. 48 (C. A.), a claim was made by prescription against a lessee of the servient tenement, as the freeholder was not legally bound. Lindley, L.J., in his well-known judgment on this subject pointed out that an easement for a term of years could be created by grant and adds, " If the plaintiff had acquired by a grant from the Crown's lessee an easement for the residue of the term . . . the surrender of that lease would not have destroyed the easement ". The argument of counsel in *Aldridge* v. *Wright*, [1929] 2 K. B. 117, at p. 122, is based on this proposition.

(3) Express Grant Between Lessees of the Same Freeholder

This is particularly important as an illustration that the old idea that unity of seisin is incompatible with easements is obsolete. P. O. Lawrence, J., in *Cory* v. *Davies*, [1923] 2 Ch. 95, at p. 111 states, " Several lessees under the same lessor may by express grant as between themselves create such easements as are claimed by the plaintiffs in this action, limited, of course, to the duration of the term vested in each lessee ".

(4) Implied Grant by a Lessor to a Lessee

These rights partake of the nature of easements and are not solely based on the idea of non-derogation, or, at least, though non-derogation be the ground for the implication, the right implied is an easement. Examples are rights of way (*Hinchcliffe* v. *Earl of Kinnoul* (1838), 5 Bing. N. C. 1, *per* Tindal, C.J., following Year Book authorities and Plowden Comm. 16; *Brown* v. *Alabaster* (1886), 37 Ch. D. 490, *Ford* v. *Metropolitan Ry.* (1886), 17 Q. B. D. 12; *Rudd* v. *Bowles*, [1912] 2 Ch. 60 at 67) and rights of support (*Mundy* v. *Duke of Rutland* (1880), 23 Ch. D. 81 at 89).

(5) Implied Grant Between Lessees

In *Cory* v. *Davies*, [1923] 2 Ch. 95, simultaneous building leases were granted under a general plan which provided for the construction of a road. Each lessee was held to have acquired an easement over the plots of the others for the term of his lease. A similar case is *Russell* v. *Watts* (1885), 10 App. Cas. 590, where a building lessee sublet adjoining houses on the basis of a building plan. One sublessee claimed that another was obstructing his light and the building plan was held conclusive. The Earl of Selborne, L.C., at 603, applied the doctrine of building schemes as to restrictive covenants and held all the sublessees bound by the terms of agreement between the lessors and lessees.

(6) Reservation of Easements on the Assignment of a Lease

In *Davies* v. *Sear* (1869), L. R. 7 Eq. 427, defendant took an assignment of a lease with notice of a right of way through an archway in the building leased. A reservation was implied against him.

(7) Implied Reservation by a Lessor

This is usually a reservation to meet a previous grant by the lessor. Dr. Stroud puts it (1940) L. Q. R. 95 : " The prior implied grant to a lessee or tenant being once established, any subsequent dealing with the servient tenement will obviously necessitate the implication of a reservation in respect of the easement so granted ". Decisions on this point are *Coutts* v. *Gorham* (1829), Moo. & Mal. 396; *Mundy* v. *Rutland* (1880), 23 Ch. D. 81, at p. 90, and the important cases of *Thomas* v. *Owen* (1887), 20 Q. B. D. 225 and *Borman* v. *Griffith*, [1930] 1 Ch. 495. In the latter case the unsuccessful defendant was a subsequent lessee and the rule in *Thomas* v. *Owen* was applied though, curiously enough, *Thomas* v. *Owen* was not cited for the proposition, perhaps because the Court thought the rule too clear to require citation of authority.

(8) Prescription by Lessees for Years

That a lessee might prescribe against another lessee is assumed and even stated in the seventeenth century and earlier. The practice is described in *Bright* v. *Walker* (1834), 1 C. M. & R. 211 by Parke, B, who held, wrongly as it has since been decided, that the Prescription Act, 1832, had altogether superseded the older forms of prescription. He pointed out that under the doctrine of lost modern grant such prescription had been possible. At p. 221 he said, " Before the statute this possession would indeed have been evidence to support a claim by a non-existing grant from the termor in the locus in quo to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence, and in practice the usual course was to state a grant by an owner in fee to an owner in fee ". Obviously a claim to prescribe at common law was impossible, as lessees were not recognised as having an interest in land as far back as 1189. Parke, B., held that the Prescription Act, 1832, could not apply, " The statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute, valid as to some persons and invalid as to others ". That claims by lost grant may still be made is confirmed by the Court in *East Stonehouse U.D.C.* v. *Willoughby Bros., Ltd.*, [1902] 2 K. B. 318 at 332, " The doctrine of lost grant . . . is, in my opinion, a most useful doctrine, and enables the court to avoid interfering with user . . . in cases not covered by the statutes of prescription . . . , though within the mischief which these statutes were intended to remedy. In particular it can be applied between termors where there is a difficulty in applying the statutes owing to the freeholder not being bound ".

It is no longer open to contend that any prescriptive claim is possible between lessees of the same lessor. Now this, it is submitted, is not really a matter of strict law but of convenience. Since a lessee, as we have seen, can make an express grant of an easement to another

lessee there seems to be no reason to refuse to presume such a grant. In fact the Court may infer such a grant as a matter of fact on some evidence, but will not presume it as a matter of law (Lindley, L.J., in *Wheaton* v. *Maple*, [1893] 3 Ch. 48). The reason for this may at one time have been that there was unity of seisin, but today this is not the real reason. The real reason appeared in *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852. Jessel, M.R., pointed out at p. 859 that the claim by prescription was based on the probability that a right must exist, as otherwise the servient owner would not have permitted the adverse user, and continued: "When you find a man doing an act which is a manifest injury to another . . . and his neighbour allows that to go on for a great number of years, it is not unreasonable to presume that he did it under some right". Now many modern easements, such as that of light, involve no interference with the enjoyment of the servient property. As Thesiger, L.J., said in *Sturges* v. *Bridgman* at 863, "Can user which is neither preventible nor actionable found an easement. We think not." (The servient owner may of course erect a large screen to obstruct the light of his neighbour, to prevent such a right arising, and this is done under the Prescription Act, 1832, s. 3, where user "as of right" is not required (see, *e.g.*, *Paddington Corporation* v. *Att.-Gen.*, [1906] A. C. 1).) In *Wheaton* v. *Maple*, [1893] 3 Ch. 48, Lindley, L.J., delivered a judgment which forms the basis of the rule known as the rule in *Kilgour* v. *Gaddes*, [1904] 1 K. B. 457 (C. A.), *i.e.*, the rule that no form of prescription applies between lessees of the same lessor. In *Maple's Case* the Court found that it was highly unlikely that the alleged grantor had made any grant. The grantors had limited powers of disposition and maintained records, in which any such grant would have been entered. Lindley pointed out that in recognising prescription of negative easements the law had already gone too far and refused to extend it. "The plaintiff has simply been enjoying his own property . . . I am not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements . . . and I am certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right." (At this point it might be interesting to note that American States do not allow prescription of light and air in many instances. In the leading case of *Pierre* v. *Fernald* (1847), 26 Maine Rep. 436, plaintiff enjoyed light for twenty years but failed to recover for obstruction. The Court pointed out that nothing had been done adverse to the defendant, which should have stung him into action, and criticised the English Courts for applying to modern negative easements the rules created for active rustic easements like way and water.) The ruling in *Wheaton* v. *Maple* (*supra*) is also very convenient, since lessees of a common lessor may enjoy privileges over each other's land without claiming any legal right, owing to their special relationship. The presumption of grant is therefore less appropriate. The present law was summed up by P. O. Lawrence, J., in *Cory* v. *Davies*, [1923] 2 Ch. 95 at 107, "It is well settled that a lessee cannot acquire a right of way over the land of another lessee under the same lessor either by prescription at common law or under the doctrine of lost grant or by prescription under the

Prescription Act, 1832". In Ireland such prescription is allowed (*Hanna* v. *Pollock*, [1900] 2 Ir. R. 664).

(9) The Anomalous Easement of Light

The fact that lessees can acquire easements of light under section 3 of the Prescription Act, 1832, is too well known to need elaboration. What may not be generally realised is a point made by *Gale on Easements* (1932) 231, that *Morgan* v. *Fear*, [1907] A. C. 429, not merely eliminated the question of "user as of right" but clearly strikes a blow at the idea that an easement can only enure in favour of a freehold or that unity of seisin prevents an easement arising.

Note on the Incidents of Easements Vested in Lessees:

Where a lessee can claim an easement the incidents of that easement are the same as they are where claimed in respect of a freehold, with obvious modifications necessitated by the terminable and qualified nature of the right. Thus the test of appurtenancy is the same (*Clapman* v. *Edwards*, [1938] 2 All E. R. 507) as is that of being continuous and apparent (*Borman* v. *Griffith*, [1930] 1 Ch. 493). In referring to the rights of lessees some Courts refer to them broadly as "easements" (*e.g.*, *Thomas* v. *Owen* (1887), 20 Q. B. D. 225 at 230, Fry, L.J.), others more technically as "quasi-easements" (*Aldridge* v. *Wright*, [1929] 2 K. B. 117 at 134, Sankey, L.J.). The attitude of the Courts has also depended on the inclination of the Judges. Jessel, M.R., in *Sturges* v. *Bridgman* (*supra*) declined to base his judgment on the fact that both parties were lessees, stating at p. 855: "I pass over technical grounds, for it appears that both the plaintiff and the defendant are lessees under the Duke of Portland". On the other extreme is the feeling of Scrutton, L.J., in *Liddiard* v. *Waldron*, [1934] 1 K. B. 435. In this case in fact no evidence of the conferring of a right on the tenant appeared and it was unnecessary to lay down any general rule. But Scrutton, L.J., at p. 439, referred derisively to weekly tenants "wandering about with a series of easements". In fact *Key* v. *Neath R.D.C.* (1906), 95 L. T. 771, is a decision of the Court of Appeal that a tenant from year to year can have an easement. Of course at some point the maxim "de minimis non curat lex" must be applied, but the practical security of many weekly tenants under the Rent Restriction Acts might make the matter something more than academic and it is submitted that an easement might be proven to exist in such a case.

An easement may be granted at law for a term of years including any fraction of a year (L.P.A., 1925, ss. 1 (2) (*a*), 205 (1) (xxvii)). All easements granted by deed or implied in a grant by deed are legal. In most cases L.P.A. s. 62 will meet the difficulty. Where a lessee can prescribe, such right also is legal. Where the right is upheld on the basis of a general scheme, as in *Cory* v. *Davies*, [1923] 2 Ch. 95, it would seem to require registration under L.C.A. s. 10.

" PLANNED " CONVEYANCING

In our last issue we wrote of the application of the maxim Caveat Emptor to the problems presented by the planning legislation to the practice of conveyancing. Of course not all the problems arise from the relation of vendor and purchaser. Some of the most abstruse are to be found in the law of settlements. Nevertheless, they all tend to flow from the same source, namely, the existing confusion concerning the precise impact of the new law on the substantive rules of land law. Fundamentally all interests in land known to the existing law are subject to what may loosely be called " third party rights ". These third party rights exercisable by the planning authorities (again using that expression loosely) may operate to change completely or to modify the existing interests. A local planning authority may serve a discontinuance of use order on an owner so that he can no longer carry on his factory or the County Agricultural Committee a dispossession order so that he can no longer farm the land. Whether we are dealing with the case of a purchaser or a limited owner these matters can affect the position drastically. A lessee who has covenanted to use the premises for the purposes of a farm only may find himself liable to forfeiture or a limited owner whose use is changed be liable in damages for waste. A purchaser may find that he has bought a factory but can use it only as a warehouse which he does not want.

These problems are not the core of this legislation. They are a by-product that probably nobody wants. We think that by taking more concern for the conveyancing aspects of this legislation many of them could be mitigated or avoided. Some should never have been allowed to arise, and it is the purpose of this article to suggest steps which could be taken to rectify some of the defects. This can be done only by legislation, and in this journal we usually take the law as we find it, but this is a matter of such grave importance to conveyancers that we feel that we are justified. We should be glad of other suggestions and criticism of our proposals.

(a) Meaning of Land

We would begin by putting in a plea for a different definition of land in the Town and Country Planning Act, 1947. It is defined (s. 119 (1)) as : " any corporeal hereditament including a building as defined by this section " and a building " includes any structure or erection and any part of a building ". It is to be observed that the structure or erection does not require to be annexed in any way to land unless it must be a " corporeal hereditament ". But the major objection is to the expression " corporeal hereditament ". In the 1932 Act land included " land covered with water and any right in or over land " : s. 53. No serious student can pretend that the expression " corporeal hereditament " does not provide serious difficulty and that on two counts. First, a hereditament properly so called is an interest in land and not the land itself. In the Planning Act we think that land is intended to mean the physical substance and not the incorporeal interest. Secondly, the precise scope of the expression " corporeal hereditament " within its

acknowledged sphere in the land law is obscure, even allowing that it can still exist since the abolition of heirs for all legal estates in land.

A discontinuance of use order under the Planning Act might require, for example, the removal of an outbuilding from the roof of which neighbouring premises had an easement of "eaves drips". An easement is not a corporeal hereditament nor is it an interest in a corporeal hereditament in any known legal sense. Must the owner go uncompensated?

We suggest that the term "hereditament" was used in the estate agents' sense as describing the subject-matter of interests in land, namely, the land itself: see *Tomkins* v. *Jones*, 22 Q. B. D. 599, *per* Bowen, L.J. The word "corporeal", therefore, only befogs the issue. Would it be true to say that "deer in a lawful park"; *Case of Swans*, 7 Rep. at p. 176; fish in a pond, rabbits in a warren, documents of title in a box; *Morgan* v. *Abergavenny*, 8 C. B. 768, all of which are said to be hereditaments, are corporeal hereditaments? It would have been more satisfactory to have a definition following traditional lines, such as "land includes all kinds of grounds, as meadow, pasture, wood, mines, etc., and also houses and all edifices whatsoever on the ground": see Co. Lit. f. 19b.

(b) Title to Use

One advantage of this form of definition would be to clear up an issue by no means obvious, namely, whether or not the grant of an easement or other privilege is a "use" within the meaning of development. It has been assumed that it is not and it is thought that this is the intention, but the distinction between the physical subject-matter and the estates and interests in that subject-matter is confused by the use of such terms as "hereditament".

More importantly this definition would bring into the open the question of whether or not "use" is a matter of "title". No doubt this can be settled finally only by decision or express legislation, and this is not the place to examine the point in detail. Nevertheless we feel that "existing" use is a matter of title. It operates as a restriction, like restrictive covenants, *Re Cox and Neve's Contract*, [1891] 2 Ch. 109; *Hone* v. *Gakstatter* (1909), 53 S. J. 286; and it cannot be discovered by inspection, because the *actual* use may not be the existing use for the purposes of the Act: cf. party wall notices and notices to pave: *Carlish* v. *Salt*, [1906] 1 Ch. 335; *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625. Hence the obligation is on the vendor to disclose and prove title. The great present difficulty of this view lies in the fact that the vendor may be ignorant and his legal adviser may have difficulty, because the necessary facts are not embodied in any document. This will *not* be the case where the "use" comes into existence after the Appointed Day, because planning permissions will be registered by the planning authority: see General Development Order, 1948 (SI 958/48), para. 12. The difficulty in other cases could, therefore, be avoided by extending the provisions relating to this register.

It is obviously not reasonable under present conditions to suggest that the whole of England should be registered, but the conveyancing problem of title to use could be dealt with much more simply.

Section 17 of the Act provides for a determination whether or not a planning permission is necessary. Application of this principle could be applied to use generally, namely, that a purchaser should be *entitled* to require production of a determination of " existing use ". Such a provision should, of course, not be capable of exclusion by contract.

The practice should be that the vendor should serve notice on the planning authority claiming the " use " he proposes to sell. It should, then, be necessary for the planning authority either to adopt or challenge this claim within a comparatively short time, say, six weeks. When accepted the " use " should be registered in the same way as planning permissions. In this way a register of all authorised " uses " would be built up without imposing an undue burden on planning authorities. It is obvious that there would be few cases in which the authority would desire to challenge the use claimed. We should emphasise that in order to make this method effective vendors must be bound by law to disclose and define the existing use in the contract and to produce the registered title to the use.

(c) Registered Land

When the land is registered land the " use " should be registered in the land registry and not with the planning authority. This, of course, applies also to planning permissions. This is obviously desirable to ensure that there is harmony between the maps at the Land Registry and the planning authority. In our opinion this also applies to subsidiary orders affecting the land, such as tree and building preservation orders. If necessary, the Land Registration Act, 1925, should be amended to include these provisions.

(d) Frustration by Planning Control

Another difficulty presented by control is the possibility of frustration, which has given rise to problems in other forms of control, such as war legislation: *Cricklewood Property, etc., Co.* v. *Leighton's Investment Trust, Ltd.*, [1945] A. C. 221; *Denman* v. *Brise*, [1948] 2 All E. R. 141; and licensing legislation: *Grimsdick* v. *Sweetman*, [1909] 2 K. B. 740. It can obviously affect other interests besides those in leases, as where a tenant for life determinable is prevented from complying with the condition by virtue of planning control under the Planning Act or the Agriculture Act, cf. *Vandyke* v. *Adams*, [1942] Ch. 155; *Re Hatch's Will Trusts*, [1948] L. J. R. 1393, arising out of the Trading with the Enemy Act, 1939.

There is no reason to allow this difficulty to continue. Covenants and conditions should be deemed to be complied with, if prevention arises from planning control. On the other hand, leases should be capable of being determined by notice where the purpose for which the land was leased becomes impossible or impracticable.

(e) Obligations of Limited Owners

A matter which, short of appropriate legislation, may take some time to settle by judicial decision, is the effect of the Acts upon the obligations of limited owners, whether beneficially entitled as tenants for life, or as trustees or personal representatives. This problem is more

intractable from the point of view of legislation and would require some more detailed legislation, preferably by way of amendment of the Settled Land Act, the Trustee Act, and the Administration of Estates Act, but such major issues as the relation between change of use and the law of waste could be settled, in our view, by the simple provision that no authorised change of use should constitute waste for the purpose of any lease, trust or settlement.

We have ventured to put forward these suggestions primarily to interest practitioners in seeking amendment of the existing legislation relating to conveyancing. Uncertainty in the law is never satisfactory, but when it affects day to day conveyancing practice it is peculiarly inconvenient. It is liable to create litigation which settles very little but the particular point on a given contract and wastes valuable time and money to no purpose. We think that a short conveyancing Act to deal with some of the major issues may be the most satisfactory course. In the meantime we should be glad to hear from subscribers of any other points of a like nature which they have encountered in the course of practice, with any proposals for action to remove the difficulties.

HAROLD POTTER.

THE SPECIAL CONTRIBUTION

By DESMOND C. MILLER, Barrister-at-Law

The provisions of Part V of the Finance Act, 1948, dealing with the special contribution, fall naturally into the sub-divisions following :—

A. Sections 47–52, and Tenth Schedule—Ascertainment of Liability to and Charge of Contribution.

B. Sections 53, 56, 57, 63, 66—Trusts.

C. Sections 58, 59, 67, 68—Miscellaneous, including Husband and Wife, Apportioned Income of Companies, Secrecy and Interpretation.

D. Sections 61, 62, 64, 65—Reliefs and Allowances.

E. Sections 54, 55, 60—Administration of the Levy.

The Commissioners of Inland Revenue in virtue of their powers under sections 55 (6) and 60 (12), *ibid.*, have made certain regulations : Statutory Instrument, 1948, No. 2029, which came into operation on September 14, 1948. The effect of these regulations is summarised as follows in the Explanatory Note issued therewith, *viz.* :—

" These Regulations lay down the procedure for carrying out the provisions of Part V of the Finance Act, 1948, which imposed the Special Contribution. They specify the manner in which assessments are to be made and in which information as to the charge to contribution is to be given to the various parties interested ; the procedure with respect to appeals ; and the machinery of collection and repayment of contribution and interest thereon. Regulation 4 makes applicable to the Special Contribution, with any necessary amendments, certain provisions of the Income Tax Act, 1918, relating to the assessment and

collection of Income Tax and to appeals against Income Tax assessments ".

A. Ascertainment of Liability and Charge of Contribution

Briefly the charge is leviable on income of the year 1947–48 upon an individual, where his total income for that year exceeded £2,000, and his aggregate investment income for the like period exceeded £250.

Thus the following must be computed: *total income*, subject to certain exceptions as for the purpose of surtax, next *investment income*, *i.e.*, income other than earned income, and finally *aggregate investment income*, *i.e.*, the aggregate of investment income.

Where liability exists (and there is no available exemption) tax is imposed on a sliding scale (cp. section 47 (1) " Table "), and there is limited provision for marginal relief.

Particular reference should perhaps be made to the Tenth Schedule, representing a limited concession granted by the Government recognising the position of working directors of small concerns who draw remuneration by means of shareholdings in such concerns.

Charge and amount of Contribution.

The charge is levied where :—

(a) total income for the year 1947–48 exceeds £2,000, and
(b) aggregate investment income for that year exceeds £250 (section 47 (1)).

Total income is ascertained, subject to the exceptions following, as for the purposes of surtax; cp. section 38 (2) of the Finance Act, 1927, " the expression total income in relation to any person means the total income of that person from all sources estimated as the case may be, either in accordance with tax chargeable at the standard rate or in accordance with those provisions as they apply to surtax " (section 48).

The exceptions :—

(a) periodical payments made under maintenance or affiliation orders of the Court, or in pursuance of a voluntary disposition, are to be treated as income of the person making the payment (section 52 (1));
(b) the annual value of property occupied under licence at will not given for valuable consideration is to be treated as income of the person entitled to occupation on revocation of the licence (section 52 (2));
(c) actual expenditure on maintenance during the year 1947–48 may, at the taxpayer's option, be deducted in lieu of the five years' average (section 62).

Thus no payment unless made for " full consideration in money or money's worth " will be an admissible deduction for this purpose. As to the meaning of the phrase, cp. section 3 (1) of the Finance Act, 1894, and *Att.-Gen.* v. *Earl of Sandwich*, [1922] 2 K.B. 500, at p. 517 : " I am not sure what is the accurate definition of money's worth. It was an expression originally introduced to exclude marriage as a consideration, and the learned counsel for the appellant defined it as any valuable consideration not being marriage. I do not intend to decide whether this is an accurate and complete definition, but I think at any

rate money's worth includes the kind of benefit accruing to the defendant in this case from the possession of the estate and the freeing of it from the claims and powers of the Earl and the Admiral". It is in any event clear that payments made by virtue only of covenant under seal as in the familiar case where provision is made for a relative will be treated as forming part of the covenantor's total income for the purpose of the Contribution.

"Valuable consideration" was defined in *Currie* v. *Misa* (1875), L. R. 10 Exch. 162, as "some right interest profit or benefit accruing to one party or some forbearance detriment loss or responsibility given suffered or undertaken by the other".

Investment income is defined as "income from any source other than a source of earned income" (section 49 (1)). As to the meaning of earned income see section 14 (3) of the Income Tax Act, 1918.

In the computation the following are *not*, for the purpose of the contribution, to be treated as investment income:

(a) income from investments (including land) if taken into account in computing the profits or gains of a trade, profession or vocation (or which would have been so dealt with had they not previously borne tax) (section 49 (2) (a));

(b) income from property occupied and used for the purpose of a trade profession or vocation, or where so occupied and used as to part only, such part of the income as is equivalent to the deduction allowed by Rule 3 (c) of the Rules applicable to Cases I and II of Schedule D (section 49 (2) (b));

(c) other income arising from any trade profession or vocation carried on by an individual *otherwise than in partnership* not being such income as is excluded by sub-paragraphs (a) and (b) above (section 49 (3));

(d) income accruing to working directors, subject to the provisions of the Tenth Schedule;

(e) income arising from life interest in property settled upon trust for the National Trust reserved to the settlor or his/her spouse (section 66, see page 124 below);

(f) income payments received otherwise than from the "income of the trust", as defined (section 53; see page 120 below).

Provisions as to Working Directors

The object of the Tenth Schedule is to give relief in cases where the contributor is a working director of a controlled private company and where the dividends received from such office in fact represent earned income.

The conditions of relief:

(a) the individual's investment income for the year 1947–48 consists in income from the share capital of the company;

(b) the company is a private company within the meaning of the Companies Act, 1929 (in Northern Ireland the Companies (No. 1) Act, 1932), in which the directors hold the controlling interest;

(c) the individual claiming relief has been a working director during a period being, or comprised in, the fiscal year 1947–8 (" the relevant period ").

The term " director " includes any person occupying the position of director by whatever name called, and any person in accordance with whose direction or instructions the directors of the company are accustomed to act. " Working director " means any director of the company who during the period in question worked full time in the actual management or conduct of the trade or business of the company.

(d) the company is not an investment company within the meaning of section 20 of the Finance Act, 1936, *viz.*, a company whose income consists mainly of investment income, that is to say, income which if the company were an individual would not be earned income;

(e) the above criteria are established to the satisfaction of the Special Commissioners on application made either before or after assessment to contribution, but in any event not later than December 31, 1950.

Extent of relief.

Investment income of the nature above indicated will not be treated as such income for the purpose of the contribution up to the extent of the following, whichever be the greater :

(a) £2,000, or

(b) £15,000, or fifteen per cent. of the profits of the company for the relevant period, whichever is the less, *divided* by the number of persons who during the relevant period were working directors of the company.

The quantum of relief, computed as above, is referred to as the " standard amount ", and in either case will be reduced by the amount of any *emoluments* received by the individual from the company, in respect of his services as working director, which are included in his total income for the year 1947–8.

In cases where the " relevant period " is less than a year, the " standard amount " is proportionately reduced, and where during this period there has been a change in the number of working directors, each period during which the numbers were constant is treated as a separate period.

Profits.

Profits of the company for the purpose of this relief are to be computed as for profits tax (without abatement and including franked investment income) except that—

(a) no deduction is allowed in respect of the remuneration of working directors (as defined), and

(b) all remuneration of other directors must be deducted.

Method of granting relief.

Relief is given by all or any of the following : discharge or reduction of assessment, or by repayment to the person who paid contribution or from whom it was recovered; interest paid is also proportionately repayable.

Directors holding office as such under more than one company.

The circumstances in which relief under the Schedule may be obtained are limited, *i.e.*, where during the relevant period:

(a) the individual claiming relief is a director, of two or more private companies—being a holding company and one or more of its subsidiaries, or one or more subsidiaries of the same holding company (as defined in section 18 of the Companies Act, 1947), and,

(b) during such period he has worked "full time" in the actual management or conduct of the business of the companies taken together.

Where these conditions are satisfied, the individual may select the company, of which, for the purpose of the relief, he shall be regarded as working director. The effect of so doing is that all emoluments as director from the inter-related companies *will* be regarded as received from the company of which he is to be treated as working director, but, he *may* require that investment income from share capital of all the companies in question shall be treated as investment income of the company selected by him as above indicated (Tenth Schedule).

Aggregate investment income is defined as "the aggregate of an individual's investment income from all sources" (section 50 (1)) and is the sum which determines the quantum of contribution. In the computation there are certain *receipts* to be *disregarded* and *deductions* which are *not allowable, viz.*:—

The receipts:

(a) terminable annuities payable by the National Debt Commissioners or by any other persons engaged in the carrying on of life assurance business, whether the annuity was originally created in favour of the recipient or not (section 50 (2));

A terminable annuity is apparently not limited to an annuity for a term of years but will include an annuity for life (the Solicitor-General in Committee, and cp. section 1 (1) of the Government Annuities Act, 1929). By virtue of section 68 (2) of the Finance Act, 1948, the definition of life assurance business contained in section 237 of the Income Tax Act, 1918, is imported, and such business, therefore, for this purpose includes the business of granting annuities. The effect is to include within the exception terminable annuities issued by, *e.g.*, Friendly Societies and Trade Unions.

(b) payments made in connection with an individual's retirement from a trade, profession or vocation or in the event of his death while so engaged, made to him or to any other person (section 50 (3));

(c) Schedule B assessments (section 50 (4));

It will be noted that the measure of relief granted by sections 61 (Where income attributable to a period of years was received in 1947–48) and 64 (Where capital subject to death duties) may reduce the amount of the aggregate investment income.

The deductions: in general any deduction admissible in the ascertainment of an individual's *total* income for the year 1947–48 is

admissible in computing aggregate investment income, but, for this purpose the following cannot be deducted :

(a) periodical payments made under the order of any Court in respect of maintenance or affiliation and payments made under voluntary disposition (sections 51 (4) and 52);
(b) retirement or other like benefits, which are disregarded in ascertaining the recipient's investment income (section 51 (1));
(c) payments deductible in computing the profits or gains of a trade, profession or vocation (section 51 (4));
(d) the excess of allowance admissible under the Income Tax Act 1945 against a specified class of income over investment income of that class (*e.g.*, the allowance admissible against agricultural income, sections 32, 56, Income Tax Act, 1945 (section 51 (3));
(e) relief in respect of losses granted under the provisions of the Income Tax Acts (section 51 (2)).

Rate of Contribution.

The charge is levied on the aggregate of the investment income, ascertained as above indicated, at the rates following :

First	£250	... ...	Nil
Next	£250	... ...	2/- per £
„	£500	... ...	4/- „ „
„	£1,000	... ...	6/- „ „
„	£3,000	... ...	8/- „ „
Remainder		... ...	10/- „ „

and a measure of marginal relief granted by the provision that contribution shall not exceed the amount by which total income exceeds £2,000 (section 47 (1) (2)).

Exemption from Contribution.

(a) Section 47 (3) of the Act provides that " contribution shall not be charged in the case of an individual who in the year 1947–48 was not domiciled in the United Kingdom, unless he was in that year resident therein and had been ordinarily resident therein throughout the period of ten years ending with the year 1947–48.

" Domiciled in the year 1947–48 " : the phrase has not as yet been the subject of judicial interpretation, but it would seem that the word " in ", viewed in the context of this part of the Act, must be construed as meaning " at any time during " and not as " during the whole period of ".

" Resident and ordinarily resident " : if the test as to domicil during the relevant period is not satisfied the levy may still be charged, if the individual was resident in the year 1947–48 and had been ordinarily resident *throughout* the period of ten years ending with that year.

Questions of residence and ordinary residence are issues of fact, cp. *Lysaght* v. *C. I. R.*, [1928] A. C. 234; 13 T. C. 511. The terms were considered and explained in *Levene* v. *C. I. R.*, [1928] A. C. 217; 13 T. C. 486, by Rowlatt, J., at p. 493, *viz.* : " Ordinarily may mean preponderatingly in point of time or time plus importance, or it may mean habitually as a matter of course, as one might say; in the ordinary course of a man's life, although in time it might be insignificant. . . .

Now there is no doubt that in this case the word ordinary is of very great importance and I do not think it is possible to say that ordinarily resident is merely the same thing as resident. . . . Now it seems to me that what the phrase ordinary residence means is this: I think that ordinary does not mean preponderating, I think it means ordinary in the sense that it is habitual in the ordinary course of a man's life, and I think a man is ordinarily resident in the United Kingdom when the ordinary course of his life is such that it discloses a residence in the United Kingdom, and it might disclose a residence elsewhere at the same time".

It will be noted that ordinary residence must have subsisted throughout the period of ten years ending with the year 1947–48; that is to say the condition must apparently be satisfied in each of the fiscal years during the material period; cp. Konstam, *Law of Income Tax*, 10th ed., p. 218 *et seq.*, where the terms are discussed, with reference to liability to United Kingdom taxation under Cases IV and V of Schedule D, Income Tax Act, 1918.

(b) No contribution will be charged in the case of an individual dying before the end of the fiscal year 1947–48 (section 47 (4)). Subject to this exemption provision is, however, made for assessment on and payment of contribution by personal representatives where the deceased individual who could have been assessed died before the assessment was made (section 47 (7)).

Payment.

Contribution is to be charged by assessment and is payable on or before January 1, 1949, or upon assessment where this is made on or after that date (section 47 (6)).

Note that under section 54 (3), p. 127, *post*, interest is charged from January 1, 1949, whether or not assessment has been made.

B. Trusts

The burden of contribution relative to investment income arising under a trust is effectively to be thrown upon the capital of the settled funds; trustees and tenants for life are given express power to apply capital, or raise money by mortgage, in payment of contribution and interest due thereon. It will be noted that in virtue of the definition section (section 68 (1)) the term "trust" will include an estate in course of administration, and the term "trustee" a personal representative, and, further, that income of an individual arising under a trust will include income treated as income of that individual in virtue of the Income Tax Acts, *e.g.*, section 21, Finance Act, 1936; section 38, Finance Act, 1938.

Income arising under a trust is computed as for purposes of surtax subject to the modifications contained in Part V of this Act; by express provision, however, payments out of capital of the trust (cp. *Lindus and Hortin* v. *C. I. R.*, 17 T. C. 442) are excluded in computing such income.

Extensive provisions dealing with the recovery of contribution from trustees and the apportionment of the liability between trusts, are included; foreign trusts (as defined) are, however, excluded from the levy.

Section 57 deals with the ultimate incidence of the contribution as between beneficiaries interested under the trust: the law relative to the incidence of estate duty, expressly imported for the purpose, will clearly give rise to difficulty in application, for example, the question as to how far such estate duty law is affected by the terms of the documents constituting the trust.

Interpretation.

The provisions of the interpretation section are operative to extend the ostensible scope of contribution in its application to trusts, thus:

(a) the term "trust" will include an estate in course of administration, and the term "trustee", a personal representative;

(b) reference to the income of an individual arising under a trust, will include income which is treated as the income of that individual by virtue of any of the provisions of the Income Tax Acts. Cf. the provisions relative to settlements contained in section 21 of the Finance Act, 1936, and section 38 of the Finance Act, 1938, by which income arising under the settlement is treated as income of the settlor (section 68 (1)).

Ascertainment of Income arising under Trusts.

For the purpose of the contribution income arising under any trust is to be ascertained in like manner as is total income for the purposes of surtax; no deduction is, however, to be made for payments to beneficiaries or those claiming under them, and in computing such income the following will be excluded:

(a) payments made out of capital of the trust (or of another trust), cp. *Lindus and Hortin* v. *C. I. R.*, 17 T. C. 442;

(b) income disregarded in ascertaining aggregate investment income or for this purpose to be treated as income of another person, *e.g.*, terminal annuities, payments under voluntary disposition (see sections 50 and 52, p. 117 above) (section 53 (2)).

It will be noted that these provisions are not to affect the ascertainment of the *individual's total income* (section 53 (3)).

Recovery of Contribution.

The effect of section 56 is to throw the burden of the contribution upon the capital of the trust funds.

Thus the contributor, *i.e.*, the individual assessed to contribution in respect of investment income arising under a trust, is enabled to recover from the trustees (speaking generally) the amount of contribution, or, where his aggregate investment income includes income other than that arising under the trust, the proportions permitted by the section.

The *proportion* so recoverable is "such amount as bears to the contribution the same proportion as that investment income (*i.e.*, the contributor's investment income which arose under the trust) bears to his aggregate investment income ascertained without any such deduction being made as is allowable under section 51 (4)" (section 56 (1)). It will be remembered that section 51 (4) permits deduction of, *e.g.*, loan interest, from the aggregate investment income, and the effect of exclusion in the present computation is to ensure that the

contributor cannot recover from the trust funds more than he has paid in contribution.

The recovery provisions apply when the contributor has paid the contribution; in lieu of payment, however, he may:

(a) give notice in writing to the Special Commissioners requiring recovery direct from the trustees; or

(b) refrain from payment for a period of twenty-eight days from the date when payment fell due,

in both these latter instances the appropriate proportion of contribution will be recoverable not from the contributor, but direct from the trustees, as a debt due to the Crown (section 56 (2)).

Provision is made for cases where the contributor has paid part of the contribution assessed but the balance remains unpaid at the expiry of the period of twenty-eight days after it was due; in such case this amount is to be repaid to him, or upon his election in writing to the contrary can be treated as paid on account of the trustees' liability (section 56 (2), proviso).

Person against whom recovery is effected.

Where the contributor has paid, or where in the circumstances above indicated has transferred from himself the liability to payment, recovery is made against the following:

(a) in the case of a continuing trust, from the trustees; or in the case of settlements within the meaning of the Settled Land Act, 1925 (in Northern Ireland the Settled Land Acts, 1882 to 1890), from the tenant for life (section 56 (3) (a)).

(b) where the trust has "come to an end", from the person who immediately after the trust came to an end was entitled at law to the trust property, if more than one proportionately to the value of their interests (section 56 (3) (b)).

End of Trust.

A trust is deemed to have come to an end when any person under its terms becomes entitled to the capital, and the trust property has in consequence vested in him or his assignee; where the determination is as to part only, the provision applies *pro tanto*.

When the trust has ended and the property has passed to mortgagees under a mortgage or charge, recovery will be made from the person who would have been entitled at law to that property but for the mortgage (section 56 (3) (b)).

Apportionment of the liability to contribution between trusts.

Where a right of recovery exists against a trust and the income of that trust (trust A) includes income from another trust (trust B), the trustees of trust A may by notice in writing to the contributor (or where the right of recovery is not exercisable by him) to the Special Commissioners, require that for the purpose of recovery the "appropriate part" of income (as defined) of the contributor shall be deemed to have arisen under trust B.

The effect of the provision is to give the contributor or the Revenue, as the case may be, the right to recover *direct* from the trustees of trust B, the appropriate fraction of contribution. The sub-section does not apply to income from a foreign trust (section 56 (4) (5)).

Time for recovery.

The right of recovery is not exercisable by the contributor unless within six months of payment he gives notice in writing to the trustees. The trustees (of trust A) having received such notice if they require apportionment of the appropriate part of income to trust B under section 56 (4) above, must in turn give written notice to the trustees of trust B within one month of receipt of the notice by them from the contributor (section 56 (6)).

Foreign Trusts.

Foreign trust is defined by section 56 (9) as " a trust of which the administration is governed by the law of any place outside the United Kingdom ", and such trusts are apparently excluded from the scope of the provisions as to contribution. The effect of section 56 (7) was summarised by the Solicitor-General in Committee as follows, *viz.*: " Not only are foreign trusts excluded but the proportion of the contributor's investment income which ultimately can be traced through to the foreign trust, even if one has to trace it through a chain of trusts, is excluded from the category of income which has to bear the contribution. In the event of a payment having been made in respect of income which can be so ultimately identified as originating from a foreign trust, provision is made for repayment by the Inland Revenue Authorities to the person who paid it ".

The sub-section provides :

(a) that the right to recover from the trustees, exercisable under section 56 (1) (2), at the instance of the contributor or of the Crown shall not be exercisable where the trust in question is a foreign trust (section 56 (7) (a));

(b) that where the contributor has paid contribution and exercised or given notice of intention to exercise, his right of recovery to the trustees of trust A (a British trust) and the trustees establish to the satisfaction of the Special Commissioners that income of trust A arises under trust B (a foreign trust), the Special Commissioners shall repay to the contributor or trustees as the case may be, the " proper proportion " of the amount recovered or recoverable (section 56 (7) (b)).

In similar circumstances where the contributor has not paid contribution the Crown's right of recovery against the trustees of the British trust is not to a like extent exercisable (section 56 (7) (c)).

(c) that the amount repayable (*i.e.*, the " proper proportion ") shall be quantified by reference to the proportion which the income arising under the foreign trust bears to the income arising under the British trust (section 56 (7) (d)).

Thus while income arising under a foreign trust is excluded from the levy such income must apparently be included in the computation of total and aggregate investment income. Further, while a contributor assessed in respect of income arising *directly* under a foreign trust may avoid payment by the exercise of his rights under section 56 (2), *supra* (cp. section 56 (7) (a)) there would

appear to be no provision authorising repayment of contribution, relative to such a source of income, when the contributor has in fact paid it.

In the case of a "British trust" where contribution has not been paid by the contributor and where both funds and trustees are out of the jurisdiction, it is not clear what steps (if any) can be taken to enforce payment: cp. R. S. C., Order 11, Rule 1.

Limitation of liability of Trustees.

The trustee or tenant for life against whom recovery of contribution is claimed may, if the corpus of the estate is insufficient to meet the demands, be released (*pro tanto*) from the obligation to pay. In order to secure such release (or limitation) it is necessary for the trustee or life tenant to show "to the satisfaction of the Special Commissioners" that the insufficiency is caused "otherwise than by any negligence or default on his part".

The latter words are so obviously widely drawn as to need no comment, and it will be observed that even where the Commissioners are so satisfied, they have a discretion as to the *terms* of any direction made by them (section 63 (1)).

Where such a direction is made a contributor who is thereby prevented from recovering any part of contribution already paid by him, is entitled to require repayment to that extent from the Special Commissioners (section 63 (2)).

Ultimate Incidence of Contribution.

Trustees and tenants for life are empowered to apply capital or raise money by way of mortgage for the purpose of paying the contribution (section 57 (1)). The section next deals with apportionment of the consequential diminution in the settled funds as between beneficiaries interested in income or capital under the trust; this it does by importing the laws as to estate duty, which are to apply to any amount of contribution payable in respect of an individuals' investment income arising under a trust as if that amount were estate duty charged on that property on the cesser of a life interest occurring at the end of the year 1947–48, and were charged as on property *not passing to the executor as such* (section 57 (2)).

Property not passing to the Executor as such.

Section 9 (1) of the Finance Act, 1894, provides that "a rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such shall be a first charge on the property in respect of which duty is leviable", *i.e.*, that duty will be treated as a testamentary expense; and section 14 (1) of the same enactment that "in the case of property which does not pass to the executor as such an amount equal to the proper rateable part of the estate duty may be recovered by the person . . . who has paid such duty from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise) under a disposition not containing any express provision to the contrary". The importance of these words therefore appears to be that the amount raised in payment of contribution (by sale of capital or by way of charge) as

reflected in the consequential loss in income, is to be apportioned *rateably* between the beneficiaries under the trust, proportionately to their interests.

To summarise, the ultimate capital loss will fall on the remainderman (though he has no interest in possession during the year 1947–48), although the person or persons actually entitled to the income during that period (*being income giving rise to a charge of contribution*) will in fact also suffer as his or their *income* will, subsequent to the payment of contribution, necessarily be diminished to the extent that the capital sum so paid is rateably apportioned to each such interest in income under the above estate duty provisions. In cases where capital required to satisfy contribution is raised by means of a mortgage or charge the beneficiaries' income will similarly be reduced to the extent of the rateable proportion of interest so payable.

Where there are several interests in income arising under a trust, one being an annuity, the other interests are required to bear the whole of the diminution in income consequent on payment of contribution unless the annuity itself gave rise to payment of the contribution (or part of it) in which event the rules as to rateable apportionment will apply (section 57 (2), proviso).

The National Trust.

Where a life interest has been reserved to the settlor or his or her spouse in income from property settled upon trust for the National Trust (as defined), such income is excluded from the settlor's or spouse's *investment income* (but not from total income) for the purpose of the contribution (section 66).

C. Miscellaneous Provisions

Secrecy.

An obligation as to secrecy is imposed on Commissioners and others concerned with the assessment, etc., of contribution (section 67).

Interpretation.

The effect of section 68 (1) in extending the ostensible scope of contribution has been seen. It will be noted that expressions used in Part V of the enactment have the same meanings as in the Income Tax Acts except where otherwise expressly provided (section 68 (2)).

Husband and Wife.

Where husband and wife were living together during the year 1947–48, the joint incomes will be treated as income of an individual in the ascertainment of total and aggregate investment income for the purposes of contribution.

The words " living together " are not defined but presumably will be given the same interpretation as the words " living with " appearing by Rule 16 (1) of the All Schedules Rules, Income Tax Act, 1918, cp. *Nugent-Head* v. *Jacob*, [1948] 1 All E. R. 414.

Assessment and charge of contribution are therefore made upon the husband, with the following exceptions :—

(a) if application is made by husband or wife for separate assessment prior to October 5, 1948 (or such later date as the Special Commissioners may allow);

(b) where separate assessments to surtax were made for 1947–48 under section 42 (9) of the Finance Act, 1927 (unless notice requiring assessment on the joint income is given prior to October 5, 1948, by the husband *and* wife).

In any event the joint incomes are treated as the income of an individual in computing the contribution due, but where separate assessment is permitted, the liability is then apportioned between husband and wife in proportion to the amount of their respective aggregate investment incomes, and for the purpose of payment and recovery they are treated as if unmarried (section 58 (4) (5)).

Even where assessment has been made upon the husband he may still avoid payment of that proportion attributable to the wife's income, as by section 58 (1), if he refrains from payment of any part of contribution for a period of twenty-eight days from the time when payment was due, the Special Commissioners " *may* " by notice in writing to the wife require her to pay an amount " which bears to the whole of the contribution (assessed on the husband) the same proportion as the aggregate investment income of the wife bears to the aggregate investment income of the husband ".

Should the wife die before such notice is given, it may be given to her personal representative, who will occupy precisely the same position as to payment and recovery of contribution as the wife, had she lived (section 58 (3)).

When husband and wife were " living together " during part only of the year 1947–48, the joint aggregate investment income will include that portion of the wife's income relative to that part of the year only (section 58 (7)), except in the case of death; thus, where either spouse dies during the year 1947–48, the survivor is assessed and charged to contribution as if unmarried during the whole of that year (section 58 (6)).

" *Controlled* " *Companies.*

In the case of companies to which section 21 of the Finance Act, 1922 (as amended by the Finance Act, 1927, s. 31, the Finance Act, 1936, s. 19) applies, briefly, companies under the control of not more than five persons (not being subsidiaries or companies in which the public are substantially interested), the Special Commissioners may by direction apportion undistributed income to members in proportion to their interests : such apportioned sum is then deemed to be income of the members in question for the period specified in the direction.

When this has been done and income so apportioned has in the case of a member been assessed to contribution, the Special Commissioners " *may* " by notice in writing require the company to pay the contribution. This discretion is exercisable where contribution has not been paid for twenty-eight days after it became due, and the company's liability is in any event limited to the proportion which the income so apportioned bears to the individual member's aggregate investment income (ascertained before deduction of interest and similar charges permitted by section 51 (4)). Notice must be given in writing to the company and contribution is payable on the day following the giving of such notice; it will be noted that the provisions of Part V of this Act apply to any company so assessed (section 59).

D. Reliefs and Allowances

Relief where income attributable to period of years received in 1947–8.

Under the provisions of the Income Tax Acts income chargeable to tax by way of deduction is deemed to be income of the year in which received (cf. section 39 (2), Finance Act, 1927), thus, *e.g.*, arrears of cumulative dividend paid during the year 1947–48 would lead to a high rate of contribution being levied. To afford relief in these circumstances the section provides that the surtax rules (cf. the Finance Act, 1927, ss. 34 and 36) which operate to "spread back" receipts of this nature shall be applied where:—

(a) application for that purpose is made to the Special Commissioners before assessment to contribution becomes final, and

(b) the Special Commissioners are satisfied that income receivable as aforesaid represents more than the income which would be attributable to a period of one full year if such income were deemed to have accrued from day to day.

The effect is that the Special Commissioners are required to make such reduction in the individual's total income as in their view will ensure that a full year's income only from the assets in question is therein included (section 61).

Allowance for Maintenance and Repairs.

War conditions and the consequent shortages in materials and manpower have led in many cases to an abnormally heavy expenditure by property owners during the year 1947–48 : it is clear that where these conditions obtain the normal basis of allowance upon the average of five years' expenditure would cause substantial hardship. The section therefore permits such owners at their option to have the appropriate allowances assessed on expenditure incurred for the year ending on March 31, 1948, or an alternative date during the fiscal year 1947–48, to be agreed with the Revenue.

Where it is desired to exercise this option application must be made to the Special Commissioners before assessment to contribution has become final (section 62).

Relief where Capital subject to Death Duties.

The section is designed to afford relief where death occurring *before the end of the fiscal year 1947–48* results in death duties being payable, so that investment income arising from the assets passing is greater than it would have been had such duties in fact been paid at the moment when the death occurred.

The effect appears to be that that portion of the estate passing on the death which is *de facto* required and earmarked to the payment of death duties is not to be treated as productive of investment income for the purpose of the contribution. It will be noted :

(a) that the term "death duties" in the section means estate, legacy or succession duties;

(b) that application for relief under the section must be made to the Special Commissioners before assessment to contribution becomes final;

(c) that the amount of income so arising, admissible for relief under the section is at the discretion of the Special Commissioners (section 64).

Relief in respect of error or mistake.

Where assessment to contribution is excessive by reason of error or mistake in a return or statement made for the purpose of the contribution, or, where subsequent to final assessment adjustment is made to an individual's total income or aggregate investment income for the year 1947–48, relief may be obtained if claimed before April 5, 1954.

The onus of satisfying the Special Commissioners that excess assessment or overpayment has been made lies upon the claimant, but where they are so satisfied the Commissioners are required to authorise the " appropriate adjustment ", which may be by discharge or reduction of assessment, or by repayment.

Repayment (where requisite) must be made to the person who has paid the contribution or from whom it was recovered, and will include any interest paid in respect of that portion of contribution (section 65).

E. Administrative Provisions. Payment and Interest on Unpaid Contribution

Payment of contribution may be made in advance of assessment, and such payment or part payment, if made before January 1, 1949, will carry interest at 2 per cent. per annum until that date.

Contribution not paid by January 1, 1949, will be charged with interest at 2 per cent. per annum (to be paid without deduction of tax) until payment, *whether assessment has been made or not.*

Possible concessional treatment was indicated by the Chancellor of the Exchequer in Committee, *viz.* : " if there are cases in which people in 1947–48 cannot ascertain the basis of their income tax or surtax which is payable in the following year or the same year, we shall consider their cases " (section 54).

Assessment Collection and service of Notices.

Contribution is a debt due to the Crown, to be assessed and charged by the Special Commissioners, who are empowered to make regulations by statutory instruments respecting assessment collection and repayment of contribution (cp. section 13 of the Crown Proceedings Act, 1947, as to enforcement of payment by the Crown).

Assessment may be made on the basis of returns rendered for the purpose of the Income Tax Acts, or where no or no sufficient returns have in the opinion of the Commissioners been made, to " the best of their judgment ". The Commissioners may require any individual by whom, in their opinion, contribution " is or may be payable " to furnish such particulars as they consider necessary for the purpose of assessment or recovery within twenty-eight days; a penalty is prescribed for failure to furnish such particulars, and from date of judgment thereon a further penalty of £50 per diem while the default continues.

The Commissioners are empowered to mitigate or remit such penalties in accordance with the terms of section 222 of the Income Tax Act, 1918 (section 55).

Appeals.

(a) *Who may appeal.*

A contributor, an indirect contributor and a wife who is required under section 58 (1) of the Act to pay any part of contribution initially assessed on her husband.

Indirect contributor is a person from whom recovery of contribution may be effected by reason of the provisions relating to income arising under trusts—normally the trustees (section 60 (1) (2)).

(b) *When appeal lies.*

(i) By the individual assessed, against any assessment (or additional assessment) made on him (section 60 (1), 68 (1));

(ii) by an indirect contributor (or individual assessed) on the grounds that the amount of income arising under the trust has been wrongly ascertained (section 60 (2) (b));

(iii) by a wife required to pay contribution initially assessed on her husband on the grounds that *her* investment income has been wrongly ascertained (section 60 (3));

(iv) by the direct or indirect contributor against a finding, that the right of recovery is limited, no repayment is due, or as to the quantum of such repayment consequential on the fact that income arose under a foreign trust (section 60 (5));

(v) under section 60 (4) against determination of any application under the following:

Section 61.—Relief where income received in 1947–48 attributable to other years.

Section 62.—Allowance in respect of maintenance and repair.

Section 63.—Limitation of trustees' liability where trust funds insufficient to satisfy contribution.

Section 64.—Relief where capital subject to death duties.

Section 65.—Relief in respect of errors or mistakes.

Tenth Schedule (see section 49).—Determination of investment income of working directors.

It will be noted that the issue on appeal by an indirect contributor is limited to the ascertainment of income arising under the trust, *i.e.*, the assessment on the contributor is not open to challenge (section 60 (2) (b)).

Time for appeal.

The section provides for various notices to be given—principally to indirect contributors: the time for appeal in each case, or by an individual assessed from notice of assessment, is "the prescribed time", *i.e.*, the time which will be prescribed by the Commissioners of Inland Revenue in regulations which they are empowered to make.

Now see SI 1948, No. 2029, para. 11.

Appeal.

The Special Commissioners are given power to summon witnesses and examine them on oath (section 60 (6)). Indirect contributors are entitled to appear or make representations in writing in any case where the amount of income arising under the trust is in issue (section 60 (2) (c)); on appeal by the indirect contributor the individual assessed has a like right of audience (section 60 (2) (d)).

Appeal from the Special Commissioners

Will lie on a point of law to the High Court under the provisions of section 149 of the Income Tax Act, 1918 (section 60 (8)).

Limitation on right of appeal.

(a) An assessment to income tax for 1947–48 which has become final and conclusive and which related only to investment income, is conclusive for the purpose of the contribution, as to the amount of income so assessed which cannot be questioned on appeal under section 60 (section 60 (8));

(b) an assessment to contribution which has become final against the individual assessed is final against any other persons, subject to the saving that where notice is required to be given under the section to such other persons, *e.g.*, the indirect contributors, that assessment shall not be final as against them until notice is given (or where appealed against, until determination of appeal (section 60 (9)).

Regulations.

The Commissioners of Inland Revenue are empowered to make regulations by statutory instrument to govern all matters relating to appeals under the section (section 60 (12)).

See SI 1948, No. 2029.

THE LOCATION OF A PUBLIC OFFICE FOR THE PURPOSES OF TAXATION

By J. A. Coutts, M.A., LL.B., Barrister-at-Law

By Rule 1 of Schedule E of the Income Tax Act, 1918, tax is chargeable " on every person *having or exercising an office* or employment of profit " mentioned in the Schedule. " The rule says ' having or exercising ', and a man may have his office in one place and exercise its duties in another " (*per* Wrottesley, J., in *The Archbishop of Thyateira* v. *Hubert*, 25 T. C. 249, 257). This dictum and the statement in Konstam's *Law of Income Tax* (10th ed., p. 241), that " the office of a director of a company . . . which is resident and controlled in the United Kingdom is a public office within the United Kingdom " are based upon the speeches in the House of Lords in *McMillan* v. *Guest*, [1942] A. C. 561, and in particular upon the passage in Lord Atkin's speech (at p. 565), to the effect that " the office of a director of an English company, the head, seat and directing power of which is admitted to be in the United Kingdom, seems to me of necessity to be located where the company is. It is, in fact, part of the organic structure of the corporation ", so that " the director of an English company which is resident in the United Kingdom, wherever he resides and whether or not he takes any part in directing the affairs of the company, holds an office in the United Kingdom ". But Lord Wright remarked (at p. 567) that the rule was being applied to a case in which " the company . . . is resident and controlled in the United Kingdom ", and expressly added : " I limit my observations to such a company without considering what is the position of a company registered in the United Kingdom but controlled and managed abroad ". It was this problem which arose

for consideration in the High Court in Eire in *Tipping* v. *Jeancard*, [1948] Ir. R. 233, where Maguire, J., lamenting that " this is a somewhat difficult question of law " and that " it is remarkable that it has not hitherto arisen and that it is not covered by authority directly in point ", decided to apply the House of Lords' rule to the novel circumstances before him.

The respondent in *Tipping* v. *Jeancard*, who was a director of a company incorporated and having a registered office in Ireland and there engaged in the work of street cleansing, admitted that the company exercised a trade in Ireland, the profits of which were assessable to tax. But, as the directors and shareholders were all resident in France and none of them visited Ireland and no meeting was held there (the company's daily work being supervised by the " Secretary and Local Manager "), the Inspector of Taxes conceded that the company was resident, controlled and managed in France. In these circumstances, could a director be said to hold an office in Ireland? It was argued on his behalf that, since the company and the director were resident, and the office exercised in France, the office must be held in France, notwithstanding the company's incorporation in Ireland, because the location of an office is where the " head, seat and directing power " (Lord Atkin's words *supra*) were. To this, however, the learned Judge replied that, although " the residence of a company for income tax purposes is preponderantly, if not exclusively, determined by the place where its real business is carried on " and " the real business is carried on where the central management and control abides ", yet " the residence of a company for income tax purposes is a somewhat different question from the location in law of the office of director ". For the inspector it had been argued that the office was held in Ireland by reason of the fact that it was established by, and depended for its existence on, Irish law, in that not only was the company's daily business carried on and its profits earned and distributed among the directors according to Irish law, but the office, rights and duties of the directors and the arbitration procedure adopted by the company were all prescribed by Irish law, on which they depended for effect and, if necessary, for enforcement. This argument was accepted by Maguire, J., who concluded that, although the office was exercised in France and not in Ireland, it was nevertheless held in Ireland, as " it was set up in accordance with Irish law and exists under its protection ".

In so concluding, Maguire, J., adopted the opinion of Sir W. Greene, M.R., in *McMillan* v. *Grant*, 24 T. C. 190, 197, that, in a case in which the problem is " to ascertain what is the true test of the locality of the office ", it may be said that, where the normal activities of the directors are exercisable and the normal rights enforceable within a country, " the office is tied " to that country. The " ties " in that case were (i) that the company was registered in the United Kingdom, (ii) that it was resident, managed and controlled there, and (iii) that the source of remuneration of the office was located there. In *Tipping* v. *Jeancard* the ties were (i) and (iii) only. In neither case, moreover, was (iii) considered to be of importance, Lord Wright being of opinion (at p. 565) that " too much emphasis may be laid on the source from which the office was remunerated ", while Maguire, J., merely noted in passing (at p. 239) that " the company's business was actively carried

on in Dublin, enabling substantial profits to be made here". The effect of Maguire, J.'s decision would, therefore, appear to be that if a company is registered within the jurisdiction, the office held by its directors is located there. The slenderness of the ties in such a case confirms Lord Wright's dictum (at p. 567) that "the office of a director is something notional; its locality is one degree, if that is possible, even more notional". *Tipping* v. *Jeancard* may be compared with the converse case (*supra*) relating to the Archbishop of Thyateira, who, although appointed by and deriving his office and authority from, the Patriarch and Synod in Constantinople, to whom alone he was legally answerable, was nevertheless held to have an office "in the United Kingdom" (*per* Wrottesley, J.), which was "locally situate in Western Europe and more specifically locally situate in London" (*per* McKinnon, L.J.).

NOTES OF RECENT CASES

1. *PROPERTY AND CONVEYANCING CASES*

Mortgage—claim for possession by originating summons—joinder of trustee in bankruptcy.—In *Martins Bank* v. *Kavanagh,* [1948] 2 All E. R. 448, Roxburgh, J., held that an originating summons could be issued by the mortgagee to recover possession under R. S. C., Ord. 55, r. 5A. He also held that where the mortgagor has been adjudicated bankrupt it is necessary to join the trustee in bankruptcy as a party to the Originating Summons. This is necessary because any party must be joined who may be prejudiced in respect of the equity of redemption and this, of course, includes a trustee in bankruptcy. In other words the order for possession is a step in enforcing the security and must be treated as such: see *Temperance Permanent Building Society* v. *Nevitt,* [1940] 3 All E. R. 237.

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2. *CHARITIES*

Gift for a purpose ancillary to charity not itself charitable—validity.—*Re Coxen,* [1948] L. J. R. 1590, may not provide any new law, but it emphasises an aspect of charity which is important. The testator left a very large capital endowment to provide for certain trustees a dinner and a fee for attendance at meetings and subject thereto to distribute the income for hospital purposes. It was argued that as the total amount of income necessary to defray the fees, which in any case could not be a large amount out of the total income, was unascertained, the whole gift failed for uncertainty: *Re Porter,* [1925] Ch. 746. It was held as a fact that the provision for holding a dinner and paying a fee for attendance was machinery to ensure that the charity would be carried out adequately by the trustees whom he wished to see to its due administration: cf. *Re Charlesworth* (1910), 101 L. T. 908. Consequently the dinner and fee, though not itself charitable, was not devoting part of the funds to a non-charitable purpose and the legacy did not fail.

It was argued (see p. 1596) that a trust to pay remuneration to the trustees in perpetuity was void as not *per se* charitable. No authority was cited to the learned Judge and he repudiated the suggestion. He did, however, point out that if the amount of the benefit was disproportionate to the amount devoted to charitable objects this might invalidate the gift altogether.

The learned Judge also summarised the *other* rules relating to mixed purposes as follows (at p. 1593): " (a) that where the amount applicable to the non-charitable purposes can be quantified the trusts fail *quoad* that amount but take effect in favour of the charitable purpose as regards the remainder; (b) that where the amount applicable to the non-charitable purpose cannot be quantified, the trusts, both charitable and non-charitable, wholly fail because it cannot in such a case be held that any ascertainable part of the fund or the income thereof is devoted to charity; (c) that there is an exception to the general rule in what are commonly known as the 'Tomb cases', that is to say, cases in which there is a primary trust to apply the income of a fund in perpetuity in the repair of a tomb not in a church [or a non-charitable object], followed by a charitable trust in terms only extending to the balance or residue of such income, the established rule in cases of this particular class being to ignore the invalid trust for the repair of the tomb and that the whole income as devoted to the charitable purpose; and (d) that there is an exception of a more general character where, as a matter of construction, the gift to charity is a gift of the entire fund subject to the payment thereout required to give effect to the non-charitable purpose, in which case the amount set free by the failure of the non-charitable gift is caught by and passes under the charitable gift ".

It is to be observed that none of these rules exactly touch the case noted. Here protection is found in the fact that the payments formed part of the machinery for giving effect to the charitable purpose. More may be heard of this kind of provision, but it is clear that its conveyancing use is very limited.

(Tudor, pp. 61, 62.)

Educational charity—registration of conveyance with Minister—no exemption—Re No. 12 Regent Street, Oxford, [1948] 2 All E. R. 568, is a warning that the Education Act, 1944, has made changes in the law relating to educational charities (*ante,* Vol. 9, p. 36). By section 87 a copy of an assurance of land to an educational charity must be sent to the Minister within six months or the assurance will be void. In the instant case Jenkins, J., held that this rule applies to *all* educational charities whether or not they were exempted from registration with the Charity Commissioners under the Mortmain, etc. Act, 1888. Consequently an assurance to Magdalen College, Oxford, required to comply with the Act.

The learned Judge also held that an assurance " for educational purposes " was not limited to establishments under the control of the Minister. Here the learned Judge applied the principle enunciated in *Re Harrow School (Governors) and Murray's Contract,* [1927] 1 Ch. 556, where a similar provision was applied to a public school. Hence it would appear that any lease conveyance and presumably bequest devise or other instrument (see section 87 (4)) must be sent or a copy must be sent within the appropriate time or it will be void.

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3. *WILL CASES*

By J. G. Fleming, D.Phil., M.A., of Lincoln's Inn, Barrister-at-Law.

Motor cars ordered but not delivered or paid for—possession and property—charge for payment of purchase price—incidence of liability.—The considerable temporary interval between the conclusion of purchase and delivery of new motor vehicles which has become such a prominent feature of post-war conditions in this country has engaged the attention of the Courts in the construction of wills on two recent occasions. In *Stark's Trustees* v. *Stark*, [1948] S. C. 41, the testator bequeathed to a legatee " any motor car which I may possess at the time of my death ". Shortly before making his will he had entered into a contract for the purchase of a car which had not been delivered by the date of his death. The Court of Session experienced no difficulty in holding that the legacy failed because there could be no possession of a corporeal object which was not in existence. One may surmise that even if the car had been earmarked for delivery by the vendor at the crucial date so as to become " appropriated to the contract " within the meaning of s. 18, Rule 5 (1) of the Sale of Goods Act, 1893, the decision would have been in the same sense since there is an appreciable distinction, in point of construction, between possession and the right to possess, and, in point of law, between possession and property.

By contrast, the wording of the will in *Re Coxen*, [1948] 2 All E. R. 492, was sufficiently precise to permit an undelivered motor car for which the testator had entered into a contract of purchase to pass under a legacy of " all motor cars . . . belonging to or ordered for any dwelling-house . . . in which I may reside at my decease ". In this case the question arose whether the obligation of paying for the car rested with the legatee by virtue of s. 35, A. E. A., 1925, which, having extended the scope of Locke-King's Act and subsequent statutes to personalty, provides that where any person dies " possessed of, or entitled to ", any interest in property which at the time of his death is charged with the payment of money, the interest so charged shall, in the absence of a contrary intention, be primarily liable for its payment. Jenkins, J., came to the conclusion that the legatee was exonerated because the testator was not " entitled to " the car at the relevant date. The section would have applied, however, if either an identified car had been sold to him or a particular vehicle had been appropriated to the performance of the contract at the time of his death, because in those situations the property would have passed to the purchaser notwithstanding non-payment by reason of which the vendor had retained possession in order to safeguard his lien for unpaid purchase money. Presumably, the same result would ensue whether title to the property had passed *at law* under the S. G. A., 1893, or *in equity* under the rule in *Holroyd* v. *Marshall* (1862), 10 H. L. C. 191.

(Theobald 168, 590.)

Leasehold property held upon trust—renewal of lease—constructive trust—principle of accrual.—The principle has been firmly established in equity since the decision of King, L.K., in the Romford Market case of *Keech* v. *Sandford* (1726), Sel. Cas. Ch. 61, that just as it is a breach of duty for a trustee to buy the trust property for himself, so equally it is inconsistent with his obligations to purchase a competing interest in the subject-matter of the trust for his own benefit. Thus he is placed under an unqualified duty to obtain a renewal of a lease on beneficial terms on behalf of the beneficiaries which is not limited to cases where the old lease

was renewable by agreement under an option or by custom or where the new term was obtained by surrender or before expiration of the old lease. This rule is based on the rationale that the trustee, being a sitting tenant, is in an advantageous position to obtain a renewal and ought not to reap the benefit of opportunities which he enjoys *qua* trustee; it may also be explained on the eminently practical ground that, unless so protected, the *cestuis que trust* would but rarely enjoy the benefit of a renewal themselves. The equitable doctrine being imperative, it can only be displaced in cases where the trust was created by will, if the testator has either in express terms or by clear implication left a direction that the trustee may retain the benefit of a renewed lease.

In *Re Knowles' Will Trusts,* [1948] 1 All E. R. 866, the testator, after giving certain legacies, left the residue of his estate to his son. By a codicil he directed him to hold his leasehold farm "for the residue unexpired of the term of 21 years" upon trust to carry on the business and divide the profits among himself and his sisters and any survivor of them for life, with the remainder to the son absolutely. The question was canvassed whether, upon renewal of the expired term, he was accountable to his surviving sister for a moiety of the net profits. Unlike Roxburgh, J., the Court of Appeal took the view that the above-quoted words of description were used by the testator solely in order to identify his interest in the property in technical language in accordance with the usual conveyancing practice, but did not lend themselves to the interpretation of also indicating the duration of the trust itself. The testator had admittedly employed phraseology which was strictly only appropriate to the interest of 21 years to which he was entitled. But by operation of the inexorable rule of equity there had been an accrual to the trust property in very much the same way as if an option included in the original lease had been exercised. The testator had in fact done no more than fail to anticipate the conceivable increase in the subject-matter of his benefaction, and the words of description in the will on which the son relied did not imply a permission to retain the renewed lease for the trustee's own benefit. In the categorical words of Cohen, L.J., the rule of equity applies "wherever a testator bequeaths his leasehold interest in property on trust, and the will is, on its true construction, silent as to what is to be done in the event of a renewal of the lease".

Satisfaction of debts by legacies—circumstances rebutting presumption —direction to pay debts and legacies—expressio unius est exclusio alterius.—The principle of satisfaction of debts by legacies has incurred the odium of judges so consistently that there is some justification for the observation that the Courts are positively leaning against the presumption by accepting the most transparent arguments for excluding its application. Unwise as the original enunciation of the doctrine may appear in retrospect, the indiscriminate and frequently artificial appeal to inconclusive circumstances as rebutting the presumption has not enhanced the credit of equity jurisprudence. Fortunately, a tendency towards a more objective and rational approach has been in evidence in more recent times, and Mr. Justice Romer's judgment in *Re Van Den Bergh's Will Trusts,* [1948] 1 All E. R. 935, repays consideration for emphasising the more flexible attitude of today in contrast with some of the dogmatic observations prevalent during the last century.

In the instant case, the testator covenanted to pay an annuity of 20s. per week to X, for his faithful service over a period of 30 years, payable quarterly in advance on the usual quarter days. Four years later, by his will, he gave several annuities including one of £52 p.a. to X, the first

payment to be made at the end of three months after the testator's death but subject to forfeiture on assignment. He also directed his trustees to hold the residuary estate upon trust for the payment of testamentary expenses and debts and the legacies bequeathed by his will. The learned judge held that, having regard to *all* circumstances of the case, the executors were obliged to pay both annuities, but it is worthy of note that there were at least two factors which *separately* have frequently been regarded as conclusively and inevitably negativing the application of the principle of satisfaction. In the first place, as long ago as 1744 Lord Hardwicke stated in *Clark* v. *Sewell,* 3 Atk. 96, that " unless the legacy is payable immediately after death ", the presumption is excluded because it is not as beneficial as the debt itself. If strictly applied, this would have been the death warrant of the doctrine in the overwhelming number of cases since pecuniary legacies are not, in the absence of a specific direction to the contrary, payable until the end of one year from the testator's death. With the exception of *Re Horlock,* [1895] 1 Ch. 516, however, the cases in which the presumption was held to be rebutted on this score were such where different times for payment were indicated in the will, and it appears to be the better opinion that Lord Hardwicke's statement must now be understood in the limited sense that the rule is excluded whenever the payment of the legacy is postponed by the testator (*per* Swinfen Eady, J., in *Re Rattenberry,* [1906] 1 Ch. 667, 671) but *prima facie* does apply in all other cases since a legacy in satisfaction of a debt with no fixed time for payment carries interest from the time of death (*Clark* v. *Sewell, supra*). In *Theobald on Wills* (10th ed., pp. 542–3) the legal position is epitomised by stating that satisfaction is rebutted " if the legacy is less advantageous than the debt; if, for instance, the legacy is payable in six months, *or no time is fixed for payment,* so that it would not in the ordinary case be payable till the end of a year, and the debt is payable at the earlier date ", and, after citing other examples of differences between debts and legacies, the author concludes: " But the mere fact that by the rules of administration a legacy is not payable until a year from the testator's death is not enough to rebut the presumption ". It would, with respect, be more conducive to clarity to admit the inconsistency between *Re Horlock* (*supra*) and the more recent line of authority represented by *Re Rattenberry* (*supra*), *Fitzgerald* v. *National Bank,* [1929] 1 K. B. 394, and other decisions, and amend the statement of text in accordance with the present submission.

In respect of annuities, the difficulties are somewhat enhanced by the fact that, even where there has been no explicit postponement of the first payment under the will, yet the exact dates of payment usually differ by virtue of the fact that the instalments under the will are payable at dates measured from the death of the testator which are not necessarily identical with those under the covenant, and it may well be that *Re Dowse* (1881), 50 L. J. Ch. 285, can be explained on that ground without proving irreconcilable with the above-quoted decisions. In *Re Van Den Bergh's Will Trusts* the testator had to some extent anticipated difficulties of this nature by providing that the first payment of the testamentary annuity was due within three months of his death, but there remained, above all, a time-lag to the marked disadvantage of the beneficiary because the annuity under the covenant was payable in advance and the testator had died shortly before the March quarter so that, if the will annuity were to be held as satisfaction of the covenanted annuity, the beneficiary would have to wait some little time before receiving any payment instead of getting a quarter's instalment a few days after the testator's death. It must be emphasised that the learned judge regarded this factor as but a " rather subsidiary " element in determining whether the presumption had been rebutted, and not alone decisive as some textbooks appear to imply.

Likewise, a direction to pay debts and legacies has often been stated as unequivocally taking the case out of the rule, although it should be remembered that the House of Lords in *Chichester* v. *Coventry* (1867), L. R. 2 H. L. 71, intimated that it is but a circumstance to which great weight ought to be given. To regard such a provision as an almost conclusive rebuttal of the presumption may have been justifiable when King, L.K., was faced with this issue in *Chancey's Case* (1717), 1 P. W. 408, but has become highly artificial in view of the prevalence of these clauses in contemporary wills. To draw a decisive inference, as did Kay, J., in *Re Huish* (1889), 43 Ch. D. 260, 264, from the undoubted premise that it is not strictly necessary to give a direction to pay debts at all is in reality tantamount to a disregard of an accepted general formula. It is noteworthy, therefore, that Romer, J., in the instant case did not feel " disposed to attach too great significance " to the direction to pay debts and legacies " if it had stood alone, although the covenanted annuity is rightly recognisable as a debt ".

An additional point of interest arose from the provision of the will that any annuity which the testator would make thereafter during his lifetime providing for any one or more annuitants thereinbefore referred to should be applied *pro tanto* in substitution for the annuity bequeathed under the testamentary instrument. It was argued on behalf of the residuary legatees that this direction signified the testator's knowledge of the rule that but for that provision any annuity *subsequently* provided would not attract the doctrine at all, but that his silence in respect of previously granted annuities must be interpreted as an indication of his reliance on the efficacy of the equitable presumption to achieve the same result. This contention was not accepted by the learned judge, who preferred to rely on the maxim *expressio unius est exclusio alterius*. The testator evidently had his mind directed to the possibility of satisfaction, and had he intended to class together all annuities, he would presumably have used unambiguous language to effect that result.

These three considerations, coupled with the fact that the annuity under the will was liable to forfeiture, combined to rebut the presumption of satisfaction.

(Theobald 541–3.)

Identical pecuniary legacies repeated in two wills—whether cumulative or substitutionary—residue undisposed of in second instrument—revocation. —In reliance on the rules of Roman Law, Lord Thurlow in *Hooley* v. *Hatton* (1772), 1 Bro. C. C. 390n., subscribed to the twin propositions that " where two pecuniary legacies were given by the same will, the legatee must prove that it was to be doubled; but where the two bequests are in different writings, there the presumption shall be in favour of the legatee ". This rule which has sometimes, rather ineptly, been described as the principle of satisfaction of legacies by legacies was in issue in *Re Bagnall,* [1948] W. N. 324, where the testatrix had by a will of 1936 given pecuniary legacies to six named relatives and placed the residue upon trust for sale to be held, after the payment of debts and legacies, on behalf of her executors in two moieties, followed by a misplaced bequest of £50 to X. In 1943 she executed a second testamentary instrument in which she repeated the appointment of executors and the six pecuniary legacies but failed to make any beneficial disposition of the residuary estate after having placed it upon trust for conversion for the payment of debts. In approaching the question whether legacies given by different instruments (which are not admitted to probate as one will) are substitutionary or cumulative, it is upon

the residuary legatees or persons entitled on intestacy to satisfy the Court affirmatively from intrinsic evidence that the testator indicated an intention of not giving both bequests. Where the second instrument contains exactly the same dispositions as the first, there is strong ground for contending that the legal presumption has been rebutted: *Gillespie* v. *Alexander* (1827), 2 S. & St. 311, but where there are discrepancies, the burden becomes appreciatively heavier. Particularly in case the second instrument adds legacies which were not included in the first, it has been said that to construe the identical benefactions as substitutional assumes that the testator executed the second will solely to give effect to the additional legacies whereas in point of fact he could have given expression to that intention without repeating the other gifts which were already included in the prior will: *per* James, L.J., in *Wilson* v. *O'Leary* (1872), L. R. 7 Ch. App. 448, 453. This difficulty did not arise in the present case because the second instrument did not introduce additional benefactions. On the other hand, it was not described by the testatrix as her "last will and testament" which would have raised a strong presumption that it was intended to displace, at least *pro tanto,* the prior testamentary disposition (cf. Lord Eldon in *Hemming* v. *Clutterbuck* (1827), 1 Bli. N. S. 479). Nor was it immaterial that the second will was far removed in date from the first, which distinguished the instant case from *Re Mitchell,* [1929] 1 Ch. 552, where the relevant documents had been executed on the same day and it was held that the gifts were substitutionary, corroborated by the circumstance that certain of the repeated provisions could not in their very nature be cumulative, as *e.g.,* a gift of £25 for the purchase of a ring. In the teeth of these adverse considerations, Harman, J., felt no doubt that the legacies given in the second will were in substitution, so far as they went, for those in the first instrument.

The further question arose as to the effect to be attributed to those parts of the first will which had not been repeated. The conclusion that the identical gifts were not cumulative was of course based on the assumption that the second instrument purported to be an entirely new disposition, but the almost inevitable inference has been repeatedly avoided in such cases that, by parity of reasoning, the whole of the first will had been revoked. As Lord Cottenham pointed out in *Kidd* v. *North* (1846), 2 Ph. 91, 98, "it is reasonable to give such effect to the incomplete instrument if it contains within itself evidence of an intention to make an entirely new disposition, and for that purpose to undo all that has been done before; but if the new disposition applies only to part of the subject-matter, the instrument being on the face of it incomplete, and not applying to other parts, it is consistent with all principle to give effect to this intention, so far as it is expressed, but to consider the first disposition as operative, so far as no substituted disposition is provided in its place". The present case did not stand in all respects *quatuor pedibus* with *Kidd* v. *North* (*supra*). Whereas in the latter no residuary gift appeared in the second document at all, in the former the residuary estate was at least referred to in the second will, though after the direction to employ it for paying debts it came abruptly to an end and did not, like the earlier disposition, indicate any beneficial interests. The learned judge was satisfied, however, from an examination of the two documents that the testatrix had not intended to supersede the earlier instrument completely, and consequently made a declaration that the first will had effectively disposed of the residue to the two executors in equal shares. Consistently, he was also prepared to hold that the legacy to X was not revoked, although that question had not been raised by the summons.

(Theobald 120–122.)

Meaning of residence—uncertainty—events causing condition to operate.—Conditions of residence have not infrequently occasioned controversy, and, in view of the popularity of such clauses attached to dispositions of property, the conveyancer is well advised to observe meticulous care in their formulation. Two questions may arise in this connection: First, whether a given clause is void for uncertainty, and secondly, whether on the facts an event contemplated in the provision has actually occurred. It will be appreciated, however, that these two matters are not entirely unrelated because a condition subsequent does not fail for uncertainty unless the determining event has been defined with insufficient precision so as "to make it impossible to decide in all conceivable circumstances whether the interest has or has not determined by reason of the provision in question". In *Re Coxen* (previously noted on a different point) Jenkins, J., explained that (a) the meaning of the word "residence" in a will depends on the context in which it is used, (b) in some contexts a perfectly definite meaning can be attached to it, and (c) it may have different implications when used in relation to residence in a particular country from those when it is used in relation to a particular house. The last observation provides the clue to the decision in *Sifton* v. *Sifton,* [1938] A. C. 656, where it was held that a stipulation "so long as she continues to reside in Canada" failed on the score of uncertainty. The testator obviously had not intended his daughter never to leave the country nor would it have been in accordance with his wishes that she might spend the whole of her time abroad provided she maintained a residence in Canada. The conclusion was, therefore, well-nigh unavoidable that he had not with sufficient precision expounded his intentions. With respect to residence in a particular house, such phrases as "to reside" (*Re Wright,* [1907] 1 Ch. 231), "to make it a home" (*Re Talbot-Ponsonby's E.*, [1937] 4 All E. R. 309) or "permanent home" (*Re Wilkinson,* [1926] 1 Ch. 842) have variously been upheld, whereas a clause "to live and reside" was repudiated by Lord Eldon in *Fillingham* v. *Bromley* (1823), T. & R. 530, primarily because the ambiguity of the first term tainted the whole phrase.

The infinitely more complex inquiry concerns the question whether the event prescribed by the clause has occurred so as to allow the gift over to take effect. It must be recognised at the outset that, apart altogether from variations in the phraseology of these provisions, by no means identical interpretations have been given by judges to identically worded clauses of this type. Thus in *Re Moir* (1884), 25 Ch. D. 605, Bacon, V.-C., gave an extremely liberal construction to the term "residence" as meaning "maintaining a residence" in the sense of keeping up the establishment without letting it to a stranger, and held that the condition had not been broken notwithstanding the fact that the beneficiary had not been in personal residence for a considerable time. It is not difficult to distinguish *Re Wright* (*supra*) where the legatee had let all rooms of the house in question except one which she had kept for casual occupation. Kekewich, J., expressed the opinion that "residence" signified "personal residence" and held that there would have been forfeiture, had it not been for the fact that the condition had become inoperative on her marriage for reasons which are not material for the present purpose. It was conceded that a person may have two residences, such as a town and a country home, but where a married woman lives with her husband at a different address and only occasionally uses a room of another house as a place of rest and amusement, the latter cannot be described as her place of residence. In *Re Wilkinson* (*supra*), Tomlin, J., described a "permanent home" as "headquarters". Thus there may be a slight difference between it and "residence" in the sense that the former term connotes a more substantial nexus. The decision itself on the facts does not shed additional light on this vexing question,

because the qualification of "voluntary" cessation of residence made it clear that, when the legatee joined her husband in a new matrimonial home in compliance with her legal duty, the determining event had not occurred.

In *Re Coxen* (*supra*) the relevant condition was "if she shall have ceased permanently to reside therein", which the learned judge construed as meaning "permanently ceased to reside", with the result that the condition was operative only in the double event of cessation of personal residence and of permanent cesser. He expressed the view that the latter event involved an element of intention, so that it could not be invoked unless the beneficiary had given up all intention of ever again resuming residence, or, in other words, had had no "*animus revertendi*". Although this would raise a difficult question in practice, at any rate prior to her death, it is no more insoluble than the determination of a person's domicile. These observations by Jenkins, J., substantially clarify the meaning of a clause of the present description, but also contain a warning against the insertion of such a provision, if it is intended to give a more limited field of freedom to the beneficiary.

(Theobald 436.)

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4. *FAMILY LAW CASES*

By R. H. Graveson, Ph.D., S.J.D., LL.M., of Gray's Inn, Barrister-at-Law.

Presumption of advancement by intended husband in favour of intended wife—Moate v. *Moate,* [1948] 2 All E. R. 486.—The man and woman engaged to marry, according to the decision of Jenkins, J., in this case, are no longer "strangers" in law for the purpose of the equitable presumption of advancement. On an adjourned summons under the Married Women's Property Act, 1882, the Court was asked to determine the beneficial ownership of a house purchased two weeks before marriage by the prospective husband, and at his request conveyed in the name of his prospective wife. The house was subject to a heavy mortgage, which the husband, after marriage, and for several years after the parties had ceased to cohabit, continued to pay off. The mortgagor was, of course, the wife as legal owner of the house.

The learned Judge rejected as "entirely contrary to common sense" the argument that this transfer should be regarded as one between strangers. Indeed, he found a stronger reason for presuming advancement between parties engaged to marry than between those already married, regarding the former as in the nature of "a gift to the lady in consideration of the marriage, a gift by way of wedding present which he intends to take effect in her favour beneficially provided the marriage is duly solemnised" (at p. 487). The proviso is all-important. While the principle applied in this decision would apparently be valid at whatever period of time in a long engagement a substantial gift were made, the presumption of advancement would only arise if the parties were eventually married to one another. Although the point did not arise for decision, presumably the presumption only operates in respect of gifts by the man to the woman, though why it should be so limited is not easy to see, once the principle has been adopted of raising the presumption between parties who are not married at the date of the gift.

Wife's separate property—action in tort accruing against husband before marriage—Curtis v. *Wilcox,* [1948] 2 All E. R. 573.—The well-known effect of the Married Women's Property Act, 1882, ss. 1 and 2, is to enable a married woman to hold property as a *feme sole,* while section 24 of the Act defines property as including a thing in action. In *Gottliffe* v. *Edelston* (1930), 99 L. J. K. B. 547, McCardie, J., had held that the term "thing in action" in the Act must be given a restricted interpretation to exclude a right of action in the wife to sue her husband for a tort committed before marriage. The facts in the present appeal resembled those in *Gottliffe* v. *Edelston.* In both cases a wife was suing her husband for damages for injuries sustained in a car accident caused before marriage by the negligence of the husband. Oliver, J., at first instance had considered himself bound by the earlier decision, but the Court of Appeal (Scott and Wrottesley, L.JJ., and Wynn-Parry, J.) has now overruled *Gottliffe* v. *Edelston* and given to the term "thing in action" a much wider interpretation, covering a right of action in tort against the husband.

Section 12 of the Act of 1882, in the opinion of the Court, did not limit the kind of property which could be the subject-matter of an action, whether against her husband or otherwise, but only limited the purpose for which an action against her husband could be brought, *i.e.,* for the protection and security of her property. However, given this extended definition of "thing in action", it is not easy to see how the functional limitation of action can materially affect the wife's powers. The "thing in action" is, *ex hypothesi,* the wife's separate property, and by its very nature an action is one, at least, if not the chief, means of ensuring its security and protection. The Court pointed out that section 12, allowing action for this purpose, constituted an exception to the common law rule, "which otherwise still applies and would still prevent a married woman from pursuing a purely personal claim against her husband, *e.g.,* for damages for libel or slander or assault" (at p. 576). In view of the Court's new definition of "thing in action" for the purpose of the Act of 1882, their last remark can only be explained satisfactorily if the personal claims to which it refers in every case arise after marriage. But the Court is not reported as having added this qualification.

Nullity of marriage—whether impotent spouse may petition—Harthan v. *Harthan,* [1948] 2 All E. R. 639.—The Court of Appeal has now decided that a spouse may base his or her petition for nullity of marriage on the ground of his or her own impotence provided that the circumstances are not such as to constitute a bar to the petition, such as knowledge of the defect at the time of marriage. The Court has thus in a rational but unexpected way resolved a doubt which has long existed in the law of nullity. In this case, which was an undefended suit (though the King's Proctor was represented), the husband petitioned for nullity on the mutually inconsistent alternative grounds (a) that his wife wilfully refused to consummate the marriage, and (b) that he himself was at all material times impotent. This, in the opinion of Lord Merriman, P., was "an embarrassing form of pleading which should not be encouraged" (at p. 640). The Court held that the husband was entitled to petition for nullity on the ground of his own impotence and that his right to do so was not conditional on the repudiation of the marriage by the wife. This conclusion was based on a long and careful review by Lord Merriman, P., of the authorities. The learned President found the chief support for his view in the pre-Reformation canon law and in a passage from the

judgment of Lord Normand in the recent Scottish case, *F.* v. *F.*, 1945, S.C. 202, in which the Lord President rejected the view that in nullity cases it was only the potent spouse that was aggrieved, adding, " Where the incapacity results from a physical or temperamental condition, for which the sufferer is not responsible, he cannot be debarred from the remedy on the ground that he has defaulted in his obligations ": (1945, S.C. at p. 208). There were, of course, circumstances, such as knowledge of the defect at the time of marriage, which would constitute a bar. In the words of Lord Merriman, P., with which Bucknill, L.J., and Hodson, J., the other members of the Court, concurred, " In my opinion, there is no reason in principle or on authority why the same should not be declared to be the law of England " (at p. 653). It must be added that this decision on the canonical ground of impotence, may possibly not apply to the four statutory grounds for annulment under the Matrimonial Causes Act, 1937, s. 7.

(Latey, p. 168.)

Nullity of marriage—Matrimonial Causes Act, 1937, s. 7 (1) (d)—proceedings instituted more than one year from the date of the marriage—Chaplin v. *Chaplin,* [1948] 2 All E. R. 408.—Section 7 (1) of the Matrimonial Causes Act, 1937, allows a husband to present a petition for annulment of marriage on the ground of his wife's pregnancy at the date of marriage by some other person, subject to three provisos of which the relevant one in this case is " (2) that proceedings were instituted within a year from the date of the marriage ". In this case the wife fraudulently concealed from her husband the fact that he was not the father of a child born seven months after the marriage. It was only two years after the marriage that he discovered the true facts. The Court of Appeal (Tucker, Bucknill and Somervell, L.JJ.) unanimously dismissed the husband's petition, rejecting counsel's argument that this proviso was in the nature of a statute of limitation to which the equitable principle of fraud should apply. The Court took the view that Parliament had used unambiguous language in dealing with these proceedings to alter the status of the parties and that it would be wrong to extend the specified period in a way which might, in some cases, render children of the marriage illegitimate.

(Latey, p. 178.)

Divorce—appeals—practice—Peek v. *Peek,* [1948] 2 All E. R. 297.—The interest of this decision lies in the holding of the Court of Appeal that it has jurisdiction to entertain an appeal from an order of the Divisional Court of the P. D. and A. Division setting aside a decree *nisi* of divorce and ordering a rehearing on the ground that further evidence had come to light which was not before the Court of first instance which granted the decree. The husband had obtained a decree of divorce on the ground of his wife's desertion. At the time of hearing his wife was in Australia, but had lodged an application to defend as a poor person and applied to a Divisional Court for a rehearing of the petition on the ground of evidence that her husband had deserted her. The Court granted the order, against which the husband appealed on the ground that it was based on an error of law of the trial Court. The Court held that the ground for ordering the rehearing was not an error of the Court at the hearing, since the Court had reached a proper conclusion on the

evidence then before it. Application for a rehearing could, therefore, be made to a Divisional Court under Rule 36 of the Matrimonial Causes Rules, 1944.

(Latey, p. 309.)

Everitt v. *Everitt*, [1948] 2 All E. R. 545.—Rule 36 of the Matrimonial Causes Rules, 1944, came up for consideration by the Court of Appeal in this case also. On a wife's undefended petition for divorce on the ground of desertion, decrees *nisi* and absolute had been pronounced and the time for appeal against the latter had expired, when the husband applied to the Court of Appeal for leave to appeal against decree absolute on the ground that the petition for divorce had never been served on him. By consent the hearing of the husband's motion was treated as the hearing of the appeal. The Court of Appeal decided that it had jurisdiction to entertain this motion to grant leave to appeal out of time and that the application was properly made to it under the Judicature Act, 1925, s. 31 (1) (e). Whether an application in these circumstances to set aside a decree absolute was a request for a rehearing under Rule 36 was doubted by the Court. No precedent could be found for such a course, but the Court of Appeal, resting its decision on s. 31 of the Judicature Act, 1925, refused to say whether an application under Rule 36 was an appropriate alternative procedure. After this decision there should be little doubt in practice that the obvious course in contesting a decree absolute on the ground of non-service of a petition is to appeal to the Court of Appeal.

(Latey, p. 306.)

Custody of Children.—Several cases of importance have recently been decided by the Court of Appeal and Divisional Courts of the P. D. and A. Division on the question of custody of children. Throughout all of them runs the golden thread, embodied in the Guardianship of Infants Act, 1925, s. 1, of "the welfare of the infant as the first and paramount consideration".

In *Allen* v. *Allen*, [1948] 2 All E. R. 413, the Court of Appeal allowed a wife's appeal against an order granting to the husband the care and control of their child. The husband had divorced his wife for adultery committed while he was serving overseas and the wife had married the co-respondent. The child had always lived with the mother and was eight years old at the date of the appeal. The father had married a widow with two children and a year after divorcing his first wife successfully applied for custody of the child. This was granted by Wallington, J., on the ground that a woman who had once committed adultery was likely to do it again and that the father now had a wife who had not committed adultery and was, therefore, more fit to look after the welfare of the child. The Court of Appeal rejected this reasoning. In the words of Evershed, L.J., "The learned judge seems to have read the word 'moral' into s. 1 of the Guardianship of Infants Act, 1925, before 'welfare'. Further, he has inferred that a woman who has once committed adultery will always repeat it. Both suppositions are wrong" (at pp. 414, 415). The Court accordingly decided that while the custody of the child remained with the father, her mother should have care and control.

The same general principle was applied by the Court of Appeal (Tucker and Somervell, L.JJ.), in *Boyt* v. *Boyt*, [1948] 2 All E. R. 436,

in making an order for the custody of children of a marriage pending a suit for divorce. But in this case the Court had also to consider, as the second most important factor, the preservation of the *status quo* until the issue between the parties was settled. The matrimonial home belonged to the wife. Some time after the husband's return from military service the wife left her home and refused to return so long as her husband remained there. He accordingly left and the wife returned and lived there with her children and their nurse until March 30, 1948, when the husband announced his intention of returning and obtained custody of their son, the wife and her younger daughter leaving the house. Shortly afterwards the wife petitioned for divorce on the ground of her husband's cruelty, and issued the present summons for custody of the children pending suit and for an injunction to restrain her husband from entering her house. The Court of Appeal reversed the decision of Barnard, J., refusing both applications. The Court held that the *status quo* which should be preserved was that existing immediately before the husband's final return to the matrimonial home, *i.e.*, when the wife was living with her children in her own home. The jurisdiction to grant an injunction was one to be exercised with care, particularly where it involved breaking up the matrimonial home. Furthermore, the matter was closely connected with the question; to whom should be granted the interim custody of the children? In granting the injunction, the Court expressed a principle that it was its duty to decide in all the circumstances where it was best for a child to be "irrespective of any preference she may have formed in a case where nothing serious can be, or is, alleged against either of the parents in regard to their conduct as a father or as a mother" (per Tucker, L.J., at p. 438). The granting of custody of both children was further strengthened by the undesirability of breaking up a family.

The effect of *Re Kinseth,* [1947] L. J. R. 642 (noted Vol. 11, p. 297), on the concurrent jurisdiction of magistrates to make orders of custody and maintenance of children under the Summary Jurisdiction (Married Women) Act, 1895, and the Guardianship of Infants Act, 1925, has been affirmed by a decision of the Divisional Court. In *Flood* v. *Flood,* [1948] 2 All E. R. 712, a husband appealed against a magistrate's order of 1948, varying an order of 1943 by revoking those parts which related to the custody and maintenance of his children. The original order was obtained by the wife under the Act of 1895 in respect of herself and her two children, and provided her with the maximum maintenance of 10s. weekly for each child. The wife applied in 1948 for the revocation of that part of the order relating to custody and maintenance of the children, and made known to the justices her intention, if the order were varied as asked, to apply for a summons under the Guardianship of Infants Act, 1925, returnable immediately.

The jurisdiction of justices to vary such an order is governed by s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, with its requirement of "fresh evidence". The justices had treated as fresh evidence the change in circumstances of both husband and wife and the fact that one of the children was in poor health. Lord Merriman, P., pointed out that, so far as the question of amount was concerned, fresh evidence was not necessary. In supporting the decision of the justices the learned President related the questions of the husband's means and the children's needs to an essential element of the question of custody, namely, the welfare of the children. "I do not think," he remarked, "that one can divorce the two integrated questions of custody and welfare of the children, on the one hand, and the means of supporting them, on the other". Whether or not justices may revoke an order under the Act of 1895 in favour of one under the Act of 1925 may well depend on whether to do

so would be for the welfare of the child concerned. Few cases could arise in which the answer would not be obvious.

In *Heworth* v. *Heworth,* [1948] 2 All E. R. 715, the learned President had already deprecated the practice of justices making concurrent orders of custody on summonses under the Acts of 1895 and 1925. In that case a wife had obtained a maintenance order for herself under the earlier Act, for the child under the later Act and an order for custody of the child under both Acts. The Court pointed out the embarrassment that this practice would cause to a husband who wished to contest the order for custody.

As a final point on custody, the decision of the Court of Appeal in *Cliff* v. *Cliff,* [1948] 2 All E. R. 760, may be noted. Under s. 7 of the Guardianship of Infants Act, 1886, a Court pronouncing a decree *nisi* of divorce may declare the guilty spouse unfit to have custody of the children. On a wife's application Hodson, J., made such an order; but the Court of Appeal held that an application under s. 7 of the Act of 1886 could only be made and determined in open court.

(Latey, pp. 233–240, 381–2.)

Divorce—connivance—Woodbury v. *Woodbury,* [1948] 2 All E. R. 684.—This welcome decision of the Court of Appeal (Tucker, Bucknill and Somervell, L.JJ.) provides a realistic and liberal interpretation of connivance. Shortly, the facts were these. The husband had been carrying on an adulterous association with the governess of his young son for several years, unknown to his wife, when the last war broke out, and the governess took the boy to live on the coast for greater safety. The wife's discovery of her husband's conduct made her very ill. After coming to an arrangement with him that he would give up his mistress or she (his wife) would divorce him, the mother and son left for America, where they stayed until 1947. Before she left and shortly after her discovery of the adultery, the wife wrote to her husband and to the governess letters which, the husband claimed, amounted to connivance. The letter to the husband, for example, beginning " Terms for a peaceful settlement ", contained as clause 2, " You continue with Sylvia as her friend and lover ". On the face of it nothing could look more like connivance than this; yet both the trial judge and the Court of Appeal held that it was not so. For acts of alleged connivance must be judged in the context of the circumstances in which they took place, and " . . . it is of the essence of connivance that it precedes the event and, generally speaking, the material event is the inception of the adultery and not its repetition . . ." *per* Lord Merriman, P., in *Churchman* v. *Churchman,* [1945] 2 All E. R. 190, 194. Furthermore, the wife's motive is a relevant consideration. The crucial test would seem to be whether the wife had a " corrupt intention " in her acts or behaviour which promoted or encouraged the continuance of adultery by her husband. In the words of Bucknill, L.J., (at p. 687), " The principle which underlies the doctrine of connivance, that a spouse must come into Court with clean hands, and the maxim *volenti non fit injuria,* seem to me inapplicable to such a case as this ". Somervell and Tucker, L.JJ., both considered that the wife's letters, taken alone, would constitute connivance. But as Somervell, L.J., points out, the suggestions which they contained were never carried out, while Tucker, L.J., remarked that the letters, " viewed in their context, . . . merely reflect the mental reactions of the wife at one stage of her struggle to put an end to her husband's adulterous association and regain his affection " (at p. 690).

While Bucknill, L.J., appeared to take the view that connivance of the adultery in 1940 would not apply to further acts of adultery after the reconciliation of the parties, Tucker, L.J., expressly reserved the question, while Somervell, L.J., did not advert to the point. This question accordingly remains almost as unsettled as before.

(Latey, pp. 113–8.)

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5. *LANDLORD AND TENANT CASES*

By Lionel A. Blundell, LL.M., Barrister-at-Law, and John T. Plume, Barrister-at-Law.

Tenancy at will—termination by simple demand of possession.—In the case of a tenancy at will "anything which amounts to a demand of possession, although not expressed in precise and formal language, is sufficient to indicate the determination of the landlord's will": *per* Tindal, C.J., in *Doe* d. *Price* v. *Price* (1832), 9 Bing. 356. So in *Fox* v. *Hunter-Paterson* (1948), 64 T. L. R. 541, Birkett, J., held that a letter saying "Failing your client's settling this matter satisfactorily this week, we have instructions to take proceedings against her for possession and damages" was a valid determination of a tenancy at will which had been created pending negotiations for a lease.

(Woodfall, 24th ed., p. 281.)

Bombed house—tenant's rights in rebuilt premises.—Following the bombed house decisions in *Ellis & Sons Amalgamated Properties* v. *Sisman* (1947), 64 T. L. R. 11, and *Simper* v. *Coombs* (1948), 64 T. L. R. 131, the Court of Appeal in *Denman* v. *Brise* (1948), 64 T. L. R. 335, considered the case where there had been a contractual tenancy prior to the complete demolition by bombing of the house, and there was no evidence of abandonment of the premises or surrender of the tenancy. The landlord built a new house on the site but would not hand over the keys to the tenant and then, some time after the house had been completed fit for habitation, determined the tenancy by notice to quit. The tenant brought an action claiming possession. It was held that the tenant became the tenant of the new house when it was completed and entitled to occupy it, and that he did not lose the protection of the Acts through being out of possession because that was due to the landlord's own wrongful conduct.

One of the points argued for the landlord was that the contract had been frustrated. That is an interesting point and one in favour of which, juristically, there is much to be said in the case of a weekly or monthly occupying tenancy of a dwelling-house. But it was not open to the Court of Appeal to entertain the argument because its own decision in *Leightons Investment Trust* v. *Cricklewood Property and Investment Trust*, [1943] K. B. 493, is binding on the Court of Appeal, though the case was upheld on another ground in the House of Lords and the question of the applicability of the doctrine of frustration to leases there left indeterminate with opinions expressed either way: [1945] A. C. 221. That is a question which will have to be taken to the House of Lords for settlement.

(Woodfall, 24th ed., pp. 342, 544; Supplement No. 5, pp. 17, 39; Rent Restrictions Guide, 2nd ed., p. 65.)

Furnished houses rent control—what constitutes a furnished letting.—In *R.* v. *Blackpool Rent Tribunal*; *Ex p. Ashton* (1948), 64 T. L. R. 338, the Divisional Court laid down a number of propositions definitive of furnished lettings within the ambit of rent tribunals, which may be briefly stated as follows:—

(1) While in the case of services the sole test is whether the tenant is contractually entitled to the services, a landlord cannot deprive a rent tribunal of jurisdiction merely by supplying furniture in the demised premises and omitting reference to it in the agreement.

(2) But the mere leaving on the premises by the landlord of an article which could be described as furniture does not turn an unfurnished into a furnished letting, the question being whether the letting is in consideration of a rent which includes payment for the use of furniture.

(3) The mere fact that a clock and a few curtains are left on the premises by the landlord does not mean that the rent for the flat includes payment for their use, and such articles could be disregarded on the principle of *de minimis*.

(4) Neither an Ascot water heater nor a gas cooker is an article commonly regarded as furniture, any more than would be a boiler or a kitchen range.

(Rent Restrictions Guide, 2nd ed., p. 77.)

Rent Restriction Acts—Crown not bound.—In *London County Territorial and Auxiliary Forces Association* v. *Nichols* (1948), 64 T. L. R. 438, the Court of Appeal confirmed that the immunity of the Crown from the operation of the Rent Restriction Acts applies also to the Army Council and the Secretary of State for War, and through them to the territorial associations which exercise certain administrative functions of the Crown including the letting of land not required for military purposes.

In the same case, out of a number of points argued on estoppel, emerged the point which may be of wider application, that the printing on a rent book of references to the Rent Restriction Acts, if they amount to a representation that the premises are within the Acts, can only be regarded as a representation of law.

(Rent Restrictions Guide, 2nd ed., p. 7.)

Rent Restriction Acts—furnished lettings, recovery of excessive rents—whether sum attributable to use of furniture is a substantial portion of whole rent.—The public attention focussed upon furnished rentals by the work of rent tribunals has produced a number of cases exploring and defining more fully than had been done hitherto the functions of County Court Judges under s. 9 of the Act of 1920. Of these, *Jozwiak* v. *Hierowski* (1948), 64 T. L. R. 322, and *Bowness* v. *O'Dwyer* (1948), 64 T. L. R. 367, have already been commented upon in these Notes (*supra*, p. 79). The rent tribunals cannot make a retrospective award so as to give the tenant a right to recover an excessive rent paid by him in the past. For that purpose the tenant has to go to the County Court under s. 9 of the 1920 Act and establish that what he has been paying has been yielding to the landlord a profit in excess of the "normal profit".

In *Roppel* v. *Bennett* (1948), 64 T. L. R. 452, the Court of Appeal confirmed that there is nothing in s. 7 of the 1946 Act to prevent a tenant who has been to the tribunal and had his rent reduced there, now applying to the County Court under s. 9 of the 1920 Act for repayment of the excess of

past rent over what the landlord can prove to be justifiable under the provisions of that section. Of course s. 9 does not apply to the new rent fixed by the tribunal. It is to be observed that the sum which the County Court Judge determines to be recoverable under the provisions of s. 9, on the basis of "normal profit", does not necessarily agree exactly with the sum fixed by the Rent Tribunal; the former governs past rent paid before the decision of the tribunal and is the measure of what the tenant can recover as overpaid; the latter is registered and represents the legal maximum for the future.

In the same case the Court of Appeal also had to consider once again the provision in s. 10 of the 1923 Act, that to take a letting out of the Acts on the ground of furniture, the amount of the rent fairly attributable to the use of the furniture must, regard being had to the value of the same to the tenant, form a substantial portion of the whole rent. Where the total value of furniture included in a letting is ascertained, and an annual percentage of that figure is reduced to a weekly figure forming part of the weekly rent, the weekly figure so arrived at is not necessarily, or even normally, the final figure to be attributed to the furniture, but is merely one of the factors to be ascertained in determining the figure so attributable. The judge is entitled to consider other relevant factors such as the cost, if not the impossibility, of the tenant's buying similar furniture for himself, which greatly affects the value of the furniture to the tenant. Such other relevant considerations may modify the weekly figure above-mentioned, and although it is desirable, said Tucker, L.J., for the Judge to indicate the final figure on which he bases his decision as to the substantiality of the portion in relation to the whole rent, he is not obliged actually to state in pounds, shillings and pence the sum attributable to the use of furniture where, having considered all the relevant matters, he is satisfied that on any view the sum attributable is or is not a substantial portion of the whole rent.

(Rent Restrictions Guide, 2nd ed., pp. 74, 75.)

Rent Restriction Acts—furnished lettings—recovery of excessive rents.—In *Riordan* v. *Minchin* (1948), 64 T. L. R. 534, a further point was decided under s. 9 of the 1920 Act and another point discussed but left indeterminate.

The Court of Appeal held that an application under s. 9 for recovery of past overpayments of excessive rent can validly be made by a person no longer tenant of the premises in question. It is only necessary that he shall have been the tenant of the premises during the period in respect of which he is claiming the repayment of excess rent. The question whether, having regard to the opening words of s. 10 (1) of the 1923 Act, s. 9 of the 1920 Act applies to all furnished lettings as originally excluded from the Acts by s. 12 (2) (i) of the 1920 Act, or only to the restricted class of furnished lettings now excluded from them as a result of s. 10 (1) of the 1923 Act, was discussed but no decision reached thereon as it was not open to the landlord to rely on that point in the Court of Appeal having regard to the way the case had been presented below.

(Rent Restrictions Guide, 2nd ed., p. 75.)

Rent Restriction Acts—1933 *Act, First Schedule, para. (g)—new employee unable to take up work because of illness—further change of circumstances after judgment.*—*Fuggle* v. *Gadsden* (1948), 64 T. L. R. 364,

was a claim for possession of a controlled house under the well-known provisions of paragraph (g) of the 1933 Schedule—letting in consequence of employment, employment ceased and house required for another employee. The person for whom the house was required had been engaged in the landlord's whole-time employment as from September 10, 1948, but was taken ill three days before that date and did not start work until October 30. In the meantime the action for possession was begun on October 1 and heard on October 22. Judgment was reserved and given for the tenant on October 29, the County Court Judge considering that the new employee could not be said to be in the employment of the landlord at the date of the hearing; but for that point he said he would have made an order.

The Court of Appeal held that paragraph (g) applied where there was a contract for services and the date thereby fixed for the beginning of the services had already arrived at the date of the hearing of the action, and the illness of the employee does not affect the position unless the contract has by reason thereof been determined.

In this case the new employee had himself terminated his employment on November 5, 1947, *i.e.*, very shortly after the County Court judgment. The Court of Appeal held that it could not take into account such subsequent matters of fact. The case had to be decided on the facts existing at the date the County Court Judge adjudicated on them; otherwise there would never be any finality.

(Rent Restrictions Guide, 2nd ed., p. 59.)

Rent Restriction Acts—sub-letting in breach of covenant—tendency determined not by forfeiture but by notice to quit after notice of breach—sub-letting held "lawful" for purposes of the Acts.—In *Marche* v. *Christodoulakis* (1948), 64 T. L. R. 466, a landlord discovered on July 19, 1947, that there had been a sub-letting without consent, in breach of covenant. Instead of exercising the right of re-entry which he had, the landlord first entered into negotiations with the object of the unlawful subtenants being taken on as his tenants direct, but these negotiations were abortive and on August 20, 1947, he served on the tenant a notice to quit for October 1, 1947. On September 1 the tenant made the last payment of rent, and he accepted it. On September 5 the landlord's solicitor wrote to the tenant's solicitor complaining for the first time of the sub-letting and saying, "If your client does not deliver up vacant possession of the premises by or before October 1, my client will not hesitate to take proceedings to enforce his rights".

Pritchard, J., following *Norman* v. *Simpson*, [1946] K. B. 158, held that by allowing the tenant to stay until the end of her term, which was in consequence of the notice to quit October 1, the landlord had elected to treat the lease as subsisting after receiving notice of the breach, by reason whereof there was no subsisting right of re-entry on October 1 and the sub-letting had to be regarded as lawful.

This seems rather hard on the landlord, who perhaps did not appreciate the nice distinction between a notice to quit and a notice under s. 146 of the Law of Property Act, 1925. Of course the acceptance of rent on September 1 reinforces the decision, but the case nevertheless illustrates the curious results which flow logically from the decision in *Norman* v. *Simpson*, applying the archaic rigidity of the common law doctrine of waiver of forfeiture to what otherwise might have been the plain issue of fact whether the landlord had assented to the sub-letting so as to make it lawful. In plain truth it was quite obvious here that that was the last thing the landlord ever intended to do, but it is difficult to see how the case could have been

extricated from the enmeshing artificialities of the doctrine of *Norman* v. *Simpson*.

(Rent Restrictions Guide, 2nd ed., p. 70.)

Lease—assignment—consent not to be unreasonably withheld—landlord wishing to prevent creation of statutory tenancy—reasonableness—mode of proposed user of premises.—The two cases of *Lee* v. *Th. Carter, Ltd.*, [1948] 2 All E. R. 690 and *Wilson* v. *Fynn*, 64 T. L. R. 395, are of the utmost practical importance as elucidating the principles under which the Court will decide whether a landlord has been reasonable or unreasonable in withholding his consent to an underletting or assignment in cases where the lease contains the usual covenant against assignment, etc., without consent. In *Lee* v. *Th. Carter, Ltd.*, the facts were rather unusual. A lease of a flat was granted to the company and it contained a provision that B., who was a director of the company and guarantor of the lease, might be permitted to reside in the flat with her family. Shortly before the expiration of the lease the company sought a licence to assign to B. The landlord refused his consent on the ground that the proposed assignee was a private individual who would be entitled to remain in occupation as a statutory tenant on the expiration of the lease whereas the company would have no such rights. The tenant purported to assign and contended that consent had been unreasonably withheld. For the tenant it was contended that the case was covered by *Re Swanson* [1946] 2 All E. R. 628. In that case the tenant was a private individual and sought, during the currency of a notice to quit, to assign to another private individual; the landlord refused his consent on the ground that the proposed assignee would become a statutory tenant on the expiration of the contractual tenancy and that he, the landlord, wished to let the premises to applicants on his waiting list. Evershed, J., held that consent had been unreasonably withheld. In the case of *Lee* v. *Th. Carter, Ltd.*, the Court of Appeal decided that consent had not been unreasonably withheld and held that the landlord had brought himself within the principles laid down in the well-known authority of *Houlder Brothers & Co.*, v. *Gibbs*, [1925] Ch. 575. The Court pointed out that the question whether a particular Act is reasonable or unreasonable cannot be decided on abstract considerations and that it must be considered in relation to the particular circumstances of each case. Tucker, L.J., expressed the view that the present case came within the language used in the *Houlder Bros. Case* and that the refusal was not only connected with the person or personality of the proposed assignee but also directly affected the subject-matter of the contract. He went on to say that although it was true that the consequences of the assignment would not show themselves until the expiration of the lease, the immediate effect of the assignment was to bring about a relationship pregnant with future possibilities which did not exist in the existing relationship between landlord and tenant. The lease was expressly designed to ensure that the company and not B. would be the tenant at the expiration of the lease and also that no statutory tenancy would arise between the lessor and B. What was more, the assignment would have deprived the lessor of the benefit of the express covenant to deliver up possession at the end of the term. The Court stressed that each case must be considered in relation to its particular facts, and Somervell, L.J., pointed out that he was not suggesting that, in all circumstances, a lease which is originally a lease to a company may not be assigned to an individual. As to the case of *Houlder Bros.*, Tucker L.J., did not think that it laid down any principles of universal application which would cover every conceivable

case; the question of reasonableness must be considered in relation to the facts of each case.

In *Wilson* v. *Fynn* the facts were again peculiar. Both landlord and tenants were chartered accountants. The landlord occupied part of the premises and wished that the remainder should be occupied by a chartered accountant. The tenants covenanted for themselves and their assigns not to permit the premises to be used otherwise than as offices " for the purpose of their business ". There was the usual covenant against underletting without consent, etc. The tenants sought consent to underlet to a company whose business was the manufacture of kitchen equipment. The landlord was on holiday at the time, and was consequently unable to consider the application immediately. The tenants thereupon let the sub-lessee into possession. The landlord commenced proceedings for forfeiture. The case was tried by Denning, J., who held in the first place that the words of the covenant did not restrict the lessees themselves to user of the premises for the purpose of the profession of chartered accountants; if the lessees had changed their profession and wished to carry on another profession or business at the premises, they would not have been precluded by the covenant from so doing. The words " their business " were sufficiently wide to cover any business which the lessees might carry on from time to time. However, the lessees had not changed their business and as the sub-lessees were using the premises for other purposes the learned Judge held that the lessees had been guilty of a breach of covenant. In the course of his judgment he said, " It seems to me that reasonableness is not something which touches both parties to the lease. Reasonableness should be read in a general sense. . . . In considering that question, I am not confined to the evidence with regard to the construction of the lease, but am entitled to have regard to any collateral agreement and to any understanding contemplated by the parties when the lease was made ". It appears from the report in [1948] 2 All E. R. 40, that the only case to which Denning, J., was referred was *Tredegar* v. *Harwood,* [1929] A. C. 72, whereas no reference is made to this case in the report in the T. L. R. The case of *Houlder Bros.* v. *Gibbs* (*supra*) does not appear from either report to have been cited to his lordship who seems, when making the observations cited above, to have relied upon certain dicta to be found in *Tredegar* v. *Harwood,* in which case certain of the learned Lords were inclined to think that the principles expressed in *Houlder Bros.* v. *Gibbs* were too narrow. However, as was pointed out in *Lee* v. *Th. Carter, Ltd.,* the case of *Houlder Bros.* v. *Gibbs* is still binding, and it is respectfully queried whether the observations of Denning, J., quoted above would have been so wide had the learned Judge been referred to *Houlder Bros.* v. *Gibbs.* Denning, J., also laid down that the lessees were not only under an obligation to ask the landlord for his consent but also to give him a reasonable time in which to consider whether he should grant it.

Reference is made to the note on *Parker* v. *Boggon* in the *Conveyancer,* Vol. 11, p. 223.

(Woodfall, 24th ed., p. 579.)

Landlord and Tenant Act, 1927—*claim by sub-tenant—user in breach of covenant in head lease—landlord requiring premises for occupation by himself—whether requirement must be reasonable.*—In *Ireland* v. *Taylor,* [1948] 2 All E. R. 450, the Court of Appeal considered the case of a claim for a new lease, or alternatively compensation, under the Landlord and Tenant Act, 1927, where the claimant, who was the sub-lessee, had been using the premises as a nursing home. Such user was permitted by the

covenants in the sub-lease but in contravention of the covenants in the head lease. The respondent, the sub-lessor contended, that if there was any goodwill the premises " could not be let at a higher rent " by reason thereof in accordance with the provisions of s. 4 (i). He said that any goodwill that might exist was valueless to him inasmuch as he could not use the premises as a nursing home himself or let them for that purpose by reason of the covenants in the head lease. This contention was rejected by the Court. Tucker, L.J., thought that the words " could be let " in s. 4 (i) did not necessarily refer to a letting only by the immediate landlord; the person contemplated might be any person who was in a position to let the premises at the determination of the tenancy, *e.g.* the head lessor, when there might be only one day left of the mesne landlord's term at the end of the tenant's lease. The words would also cover the case where the mesne landlord would have to obtain the consent of, for example, the head lessor. Somervell, L.J., came to the same conclusion though upon rather different reasoning. He held that on the facts of the case there was some doubt as to whether the head lessor ever intended to enforce the covenant in the head lease. The head lessor had taken no proceedings to forfeit the lease. He ruled that, if such a covenant in the head lease was to be relied upon to defeat the sub-lessee's claim, the tribunal must be satisfied beyond all reasonable doubt that it was the intention of the head lessor to enforce the covenant. Here there was no such proof, indeed it was very doubtful whether the head lessor intended to enforce his rights.

The Court considered a further point which arose under s. 5. The respondent disputed the tenant's claim on the further ground that he " required the premises for occupation by himself ", an answer afforded him by s. 5 (3). He said he particularly wanted the premises as one of the rooms was especially suited for use as a studio and that he wished to use it for that purpose. The learned County Court Judge thought that this wish was a " mere whim " and declined to accede to the respondent's claim. The Court of Appeal held that the respondent had made out his answer and laid down that provided he could satisfy the Court that he in fact desired possession and genuinely intended to occupy the premises the landlord was the sole arbiter as to whether he required the premises for occupation or not. The Court was not entitled to consider whether the landlord's requirement was reasonable or not.

(Woodfall, 24th ed., p. 1068.)

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6. *INCOME TAX CASES*

By L. J. Stein, Barrister-at-Law.

Income tax—undistributed income arising under settlement—whether settlor has an interest—Finance Act, 1938, Section 38 (3) and (4).—The effect of sub-section (3) of section 38 of the Finance Act, 1938, read together with sub-section (4), is that, subject to certain exceptions, undistributed income arising under a settlement is for tax purposes to be attributed to the settlor if the settled fund or its income " is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever ". The question which arose in *Glyn* v. *C. I. R.*, [1948] 2 All E. R. 419, concerned the limits (if any) to be placed upon the sweeping words, " in any circumstances whatsoever ". The effect of a disentailing deed and re-settlement executed by a father and son was, so far as material, that certain investments were held by trustees

upon such trusts as the father and son should jointly appoint, and, that in default of and subject to such appointment, the trustees were to accumulate the income for a specified period, with power, at the end of the period, to transfer the accumulations to the son. No trusts having been jointly declared by the father and son, the income had, in fact, been accumulated by the trustees. On these facts, it was contended by the Crown that Section 38 (3) and (4) applied, so as to require the undistributed income to be treated as income of the father as settlor. It was common ground that some limit must be placed upon the words " in any circumstances whatsoever ", and that they were not to be read as extending to the possibility of a mere voluntary gift of the income of the settled fund, or part of it, by a beneficiary to the settlor. It was, however, pointed out that, in the case under consideration, there was inherent in the settlement itself the possibility of an arrangement between the father and the son whereby the father might benefit. While it was true that the father could not touch the settled fund or its income without the consent of the son, it was also true that during the accumulation period specified in the provisions taking effect in default of an exercise of the joint power, the son could get nothing without the consent of the father. The possibility to be considered was, therefore, not solely the possibility of a mere voluntary gift by the son. This reasoning prevailed with Singleton, J. (as he then was), and the learned Judge decided—as he said, with regret—that the income of the settled fund must be treated as income of the father.

Income tax—capital sum paid to settlor by body corporate connected with the settlement—Finance Act, 1938, Section 40.—The effect of section 40 of the Finance Act, 1938, is that, where a capital sum is paid directly or indirectly by the trustees of a settlement to the settlor, the amount of that capital sum, to the extent to which it falls within the amount of the trust income available for the payment, is to be treated as income of the settlor. A capital sum is defined as meaning a sum paid by way of loan or repayment of a loan or any other sum paid otherwise than as income and not paid for full consideration. For the purposes of these provisions, " any capital sum paid to the settlor . . . . by any body corporate connected with the settlement shall be treated as having been paid to the trustees of the settlement ". In *Potts' Executors* v. *C. I. R.*, [1948] T. R. 297, a question arose as to the construction of the words, " paid to the settlor ". A number of shares in a privately controlled company in which A was largely interested were held by the trustees of a settlement made by him for the benefit of members of his family. A had for many years had a current account with the Company, the practice being for the Company to make sundry payments on his behalf and debit them against his salary and allowances. His account with the Company was usually in credit, but on certain occasions payments of surtax made for him by the Company resulted in its being temporarily overdrawn. The Company being incontestably a " body corporate connected with the settlement ", the Crown contended that the above-mentioned transactions were caught by section 40, above. This contention was rejected by Singleton, J. (as he then was), on the simple ground that the sums caught by Section 40 were sums " paid to the settlor ", that there was no justification for giving any extended meaning to these words, and that sums paid by the Company to a third party on A's behalf could not be said to be sums paid to A.

Income tax and surtax—transfer of assets—income becoming payable to person abroad—Finance Act, 1936, Section 18.—The decision of the Court of Appeal in *Congreve* v. *C. I. R.* (see *The Conveyancer,* June, 1947, at p. 301), has been affirmed by the House of Lords (1948) 1 A. E. R. 948. Lord Simonds, in delivering a speech in which all the other Law Lords concurred, referred to the question whether the income to be attributed to a taxpayer who is vulnerable under section 18 of the Finance Act, 1936, includes income of the person abroad which cannot be traced to any transferred assets. Lord Simonds observed that, if and so far as the Court of Appeal had decided that such income was to be included, this was a point on which no opinion need be expressed, since it did not arise on the facts of the case under appeal. To this extent the decision in the House of Lords slightly qualifies the judgment of the Court of Appeal.

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7. *ESTATE DUTY CASES*

By L. J. Stein, Barrister-at-Law.

Estate duty—accumulations of income under settlement—whether property passed on death of beneficiary—Finance Act, 1894, Section 1.—Romer, J.'s decision against the Crown's claim to estate duty under section 1 of the Finance Act, 1894, in *Att.-Gen.* v. *Eckford,* [1948] T. R. 183, was the subject of a note in *The Conveyancer* for June, 1948, at p. 313, where the complicated and very peculiar facts were summarised. There is no need to recapitulate them here, but it should be recorded that the judgment of Romer, J., has now been reversed by the Court of Appeal ([1948] T. R. 301) leave being given to appeal to the House of Lords. The circumstances were so exceptional that the case is of little general interest, save in so far as it illustrates the application of the familiar principle that, in deciding whether there has been a section 1 passing on the death, the test to be applied is whether, on the death, there has been some actual change in the title or possession of the property as a whole—*per* Lord Parker in *Att.-Gen.* v. *Milne,* [1914] A. C. 765, at page 779.

THE LIBRARY

Prideaux's Forms and Precedents in Conveyancing (24th Edition). 1948, vol. 1, Contracts of Sale and Conveyances on Sale. Edited by J. B. Richardson. lxxxiv and 939 pp. London: Stevens & Sons, Ltd. The Solicitors' Law Stationery Society, Ltd. (£3.)

This is an attractive and manageable edition of a standard work. "Prideaux" is something more than a collection of forms, since it also presents the substantive law, upon which the precedents are based, in the form of special introductory chapters and in numerous notes to the individual precedents. In some cases very useful pointers on outstanding problems are given, such as the note on perpetuities in relation to rights of entry attached to legal rentcharges (p. 404) and the caution against omitting words of limitation of a fee simple (p. 466, note 7).

Since the text went to press in June, 1947, many statements of law must now be qualified in the light of more recent cases. An instance is the note (p. 647) on the

powers of trustees for sale to purchase land. The omission of special forms concerned with Town Planning seems over-conservative in view of the imminence of the entry into force of the 1947 Act when this work was being prepared for publication. A special problem is posed by the fact that the editor of this work has two different places for statements of law. Thus in the main dissertation the case of *James Macara* v. *Barclay,* [1945] K. B. 148, on vacant possession is not cited (p. 120), although it is dealt with in the learned note at another place (p. 355). More frequent cross-references would seem desirable without overloading an already huge work.

A few minor objections to statements of substantive law might be voiced. The doctrine of implied grant is not explained as the basis of the decision in *Borman* v. *Griffiths* (pp. 213, 229). The identification of licenses as "easements in gross" (p. 116, note 17) has no basis in the authorities. There is a misleading reference to equitable interests in land, including interests in the proceeds of sale (p. 425, note 87). It is true that L. P. A., s. 137, applies to both, but they are not identical. More information on searches under the Land Registration Act seems called for with the greater importance of registered title. In the preface the learned editor does not identify all the new precedents. It would be useful if each of these was specified.

A work of this kind can ultimately only be judged by its users. Most conveyancers will already be familiar with the particular arrangement adopted in "Prideaux". They will welcome this new edition and look forward to the other two volumes which are soon to appear.

Rent Restrictions Cases. By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law. Second edition. London: Sweet & Maxwell, Ltd., and The Estates Gazette, Ltd. xliii (773 cases: unpaged), 1948. (30s.)

Anything on the subject of the Rent Restrictions Acts from the author of that most accurate and useful compendium, the *Rent Restrictions Guide,* already bears the hall-mark of technical excellence. To this is added a scholarly grasp of principle, which one expects from the present editor of *Woodfall.*

This portable library of case law on the Rent Restrictions Acts will be of the greatest help to practitioners. The task of finding one's law is lightened by a concise digest of cases, an alphabetical table of cases and a full index. It is rather a solemn thought that there are now nearly 800 cases digested, compared with about 550 in the First Edition, which was published as recently as 1944. Cases reported up to and including March, 1948, have been dealt with. Even in the brief time since March this inexhaustible branch of the law has grown. The important question of the right of tenants of bombed houses to return to new houses built on the bombed sites has been further elucidated in *Simper* v. *Coombs,* [1948] L. J. R. 1080, and *Denman* v. *Brise,* [1948] L. J. R. 1388, since *Ellis & Sons* v. *Sisman,* [1948] L. J. R. 929 was decided. The *Neale* v. *Del Soto,* [1945] K. B. 144 line of cases, about sharing rooms, has been developed in *Llewellyn* v. *Hinson,* [1948] 2 K. B. 385, and *Winters* v. *Dance,* [1948] W. N. 317, and is now attracting the attention of the Legislature. *Thynne* v. *Salmon,* [1948] K. B. 482, L. J., which is included in this digest, has been applied in *Smith* v. *Mather,* [1948] L. J. R. 1209, and in *Mount* v. *Childs,* [1948] S. J. 498. The judgment of Scrutton, L.J., in *Skinner* v. *Geary,* [1931] 2 K. B. 546, now requires interpretation in the light of *Langford Property Co., Ltd.* v. *Tureman,* [1948] W. N. 379, where the Court of Appeal held that a man might have two homes.

The present reviewer rather regrets the omission of page numbers from this edition, although they may be said to be unnecessary in view of the serial numbering of the cases.

[*Note.*—The publishers ask us to say that cumulative supplements to the book reviewed above will be issued annually.—*Ed.*]

STATUTORY INSTRUMENTS

Local Land Charges (Amendment No. 2) Rules, 1948
(SI 1948, No. 2471/L. 28)

Made	13*th November,* 1948
Coming into Operation .	30*th November,* 1948

1.—(1) These Rules may be cited as the Local Land Charges (Amendment No. 2) Rules, 1948, and shall come into operation on the 30th day of November, 1948.

(2) In these Rules a Rule, paragraph, Schedule or Part of a Schedule referred to by number means the Rule, paragraph, Schedule or Part so numbered in the Local Land Charges Rules, 1934, as amended by any subsequent Rules.

(3) The Interpretation Act, 1889, applies to the interpretation of these Rules as it applies to the interpretation of an Act of Parliament.

2.—Paragraph (1) of Rule 2 shall be amended as follows:—

(a) The following definition shall be inserted after the definition of the Town and Country Planning Act, 1947, namely:—

"'The Acts relating to previous planning control' means the Act of 1932, any enactment repealed by that Act or repealed by any enactment which that Act repeals, the Act of 1943, the Town and Country Planning Act, 1944, the Restriction of Ribbon Development Acts, 1935, and 1943, the Building Restrictions (War-Time Contraventions) Act, 1946, or any one or more of the foregoing enactments".

(b) For the definition of "planning charges" there shall be substituted the following, namely:—

"'Planning charges' means local land charges, other than charges securing the payment of money, which are prohibitions of or restrictions on the user or mode of user of land or buildings which take effect by virtue of the Act of 1947 or the Acts relating to previous planning control".

3.—Paragraph (1) of Rule 4 shall be amended as follows:—

(a) in sub-paragraph (*c*) of paragraph (i) there shall be added the words, "or paragraph (iv)"

(b) the following paragraph shall be added to the proviso, namely:—

"(iv) in the case of any rights conferred by section 12 of the Requisitioned Land and War Works Act, 1948, the proper officer shall be the clerk, or the person for the time being authorised to act as clerk, of the County Council or the County Borough Council in whose area the land affected is situate".

4.—In paragraph (d) of Rule 5 there shall be added the words, "and to any rights conferred by section 12 of the Requisitioned Land and War Works Act, 1948".

5.—The following new Rule shall be inserted after Rule 10A and shall stand as Rule 10B, namely:—

" Notwithstanding anything contained in these Rules registrations of planning charges made before the 30th day of November, 1948, in Parts III or IV of any Register shall remain effective without further registration ".

6.—The following paragraph shall be substituted for paragraph I of the Second Schedule, namely:—

" Registration of a local land charge or priority notice, on the application by a local authority to the Registrar of another or by a Minister:—

	s.	d.
(i) in Part I of the Register, per entry	20	0
(ii) in Parts II, III or IV, per entry	1	6 "

7.—In paragraph 2 of the Second Schedule the words " a Minister " shall be substituted for the words " the Commissioners of Works ".

EXPLANATORY NOTE

(*This Note is not part of the Rules, but is intended to indicate their general purport*)

These Rules amend and clarify the Local Land Charges Rules, 1934, and provide for the registration in Part III of the Local Land Charges Registers of charges created by the combined operation of sections 76, 77 and 78 of the Town and Country Planning Act, 1947 (and Regulations made thereunder) and the Acts relating to previous planning control as defined in these Rules. It is provided, however, that charges, which are now included in the definition of planning charges and which are already registered in Parts III or IV of any Register, need not be re-registered.

These Rules also provide for registration in the Registers of County Councils or County Borough Councils of rights conferred by section 12 of the Requisitioned Land and War Works Act, 1948 (in respect of Government Oil Pipe Lines).

The Fee Order contained in the Second Schedule to the Principal Rules is also amended to prescribe fees for the registration of the charges to which the present Rules relate.